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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-7004

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	5
STATEMENT OF THE CASE	11
REASONS FOR GRANTING THE WRIT	21
I. This Court Should Resolve The Existing Conflict As To Whether Federal Common Law or State Law Determines The Standing of Private Litigants As Third Party Beneficiaries To Sue Non-Federal Entities For Breach of Grant Agreements Entered Into With The Federal Government	21
II. The Decision Below Is Erroneous And Is In Irreconcilable Conflict With Both Federal Common Law And State Law	23
III. The Paramount And Overriding Interest Of The Federal Government In Regulating All Phases of Aeronautical Commerce Preempts At Least To A Limited Degree Local Laws Concerning Sovereign Immunity	29
IV. The Decision Below Has Resulted In An Unconstitutional Denial Of Equal Protection	32
CONCLUSION	35
CERTIFICATE OF SERVICE	36

TABLE OF CONTENTS—Continued

Page

APPENDICES:

Appendix A—En Banc opinion of the Fifth Circuit Court of Appeals entered on August 25, 1976 ..... 1a

Appendix B—Original opinion of Fifth Circuit Court of Appeals entered on January 30, 1976 and April 5, 1976 Order granting rehearing en banc 17a

Appendix C—Opinions of District Court 35a

Appendix D—Judgment on rehearing en banc of Fifth Circuit Court of Appeals entered on August 25, 1976 ..... 55a

TABLE OF AUTHORITIES

Cases:

Association of Data Processing Service Organizations, Inc., v. Camp, 397 U.S. 150 (1970) 25

Barlow v. Collins, 397 U.S. 159 (1970) 25

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967) 24

Briggs v. Sagers, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970) 30

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 33

Caroway v. City of Atlanta, 85 Ga.App. 792, 70 S.E.2d 126 (1952) 32

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968) 30

TABLE OF AUTHORITIES (Continued)

Page

Cases—Continued:

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 31

City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1971) 23, 25

Deason v. DeKalb County, 222 Ga. 63, 148 S.E.2d 414 (1966) 27

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 2, 3, 26

Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968) 34

Hancock County v. Williams, 230 Ga. 723, 198 S.E.2d 659 (1973) 28

Holland v. Phillips, 94 Ga.App. 361, 94 S.E.2d 503 (1956) 26

Levy v. Louisiana, 391 U.S. 68 (1968) 33, 34

Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975) 23

M. R. Thomason & Associates v. Wilson, 125 Ga.App. 658, 188 S.E.2d 805 (1972) 27

Parden v. Terminal Railway of Alabama State Docks Dept., 377 U.S. 184 (1964) 29

Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3rd Cir. 1971) 30

Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D.Pa. 1967) 15, 23

Royster Guano v. Virginia, 253 U.S. 412 (1920) 33

Seaboard Air Line R.R. v. Crisp County, Georgia, 280 F.2d 873 (5th Cir. 1960), *cert. denied* 375 U.S. 942 (1961) 24, 28

TABLE OF AUTHORITIES (Continued)

Page

Cases—Continued:

Sheppard v. Bridges, 137 Ga. 615, 74 S.E.2d 245 (1912) 26

Smith v. Ledbetter Brothers, Inc., 111 Ga.App. 238, 141 S.E.2d 322 (1965) 26, 27

Southern Airways Co. v. DeKalb County, 102 Ga.App. 850, 118 S.E.2d 234 (1960) 27, 32

State Construction Company v. Johnson, 88 Ga.App. 651, 77 S.E.2d 240 (1953) 27

Taylor v. King, 104 Ga.App. 589, 122 S.E.2d 265 (1961) 32

Town of New Windsor v. Ronan, 481 F.2d 450 (2nd Cir. 1973) and 329 F.Supp. 1286 (S.D.N.Y. 1973) 23

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 34

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1652 5

49 U.S.C. § 1701 ..... 3, 4, 5

49 U.S.C. § 1711 ..... 6, 19

49 U.S.C. § 1713 6

49 U.S.C. § 1714 6

49 U.S.C. § 1716 7

49 U.S.C. § 1718 7

49 U.S.C. § 1718(3) 19

Ga. Code § 11-201 ..... 9, 32

Ga. Code § 11-205 9

TABLE OF AUTHORITIES (Continued)

Page

Statutes—Continued:

Ga. Code § 11-402 10
Ga. Code § 11-403 10
Ga. Code § 3-108 ..... 10, 26
Ga. Code § 23-1501 27
Ga. Code § 23-1502 ..... 5, 11, 27, 33

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FIREMAN'S FUND INSURANCE COMPANY,

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DEKALB COUNTY, GEORGIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Fireman's Fund Insurance Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting en banc, entered in this case on August 25, 1976, which judgment reversed a portion of the original Fifth Circuit panel decision and which judgment also affirmed the entire judgment entered by the United States District Court for the Northern District of Georgia dismissing respondent DeKalb County as a party on grounds of sovereign immunity.[1]

OPINIONS BELOW

The en banc opinion of the Fifth Circuit Court of Appeals, entered after rehearing, is reported at 538

[1] Three other petitions have been or will be filed relating to the decision below. Petitioner suggests that it would be appropriate to consolidate all of the petitions for decision.

F.2d 643 and is reprinted in Appendix A, *infra*, p. 1a. The original panel decision of the Fifth Circuit Court of Appeals, and the order granting rehearing en banc, are reported at 526 F.2d 679 and are reprinted in Appendix B, *infra*, p. 17a. The opinion of the District Court (R. 224, A. 117)[2] is not reported, but is reprinted in Appendix C, *infra*, p. 35a.

JURISDICTION

The original panel decision of the Fifth Circuit Court of Appeals was entered on January 30, 1976, and respondent DeKalb County's timely petition for rehearing en banc was granted on April 5, 1976. (Appendix B, *infra*.) The en banc decision of the Fifth Circuit Court of Appeals was entered on August 25, 1976. (Appendix A, *infra*.) The judgment on rehearing en banc of the Fifth Circuit Court of Appeals was entered on August 25, 1976 and is reprinted in Appendix D, *infra*, p. 55a. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Must a Federal Court in a diversity of citizenship case ordinarily subject to the holding of *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), be governed by federal common law in determining whether private litigants have standing as third party beneficiaries to sue a county for breach of safety covenants contained in Grant Agreements entered into between the F.A.A. and the county for improvement of the county airport, which safety covenants ex facie are intended for the safety and benefit of aeronautical users of the

[2] "R" refers to the Record filed in the Fifth Circuit and "A" refers to the Appendix filed in the Fifth Circuit.

county airport, and, if federal common law does apply to such issue, should not the Federal Court in deciding such issue follow the federal common law rulings of other Federal Courts (including Circuit Courts of Appeals) on the question?

2. If a Federal Court in a diversity of citizenship case should not apply federal common law in determining whether private litigants have standing as third party beneficiaries to sue a county for breach of safety covenants contained in Grant Agreements entered into between the F.A.A. and the county for improvement of the county airport, which safety covenants ex facie are intended for the safety and benefit of aeronautical users of the county airport, does not the holding of *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), require the Federal Court to follow and apply the substantive law clearly and on several occasions announced by the highest appellate courts of the forum state with respect to the question at issue, rather than the Federal Court's concept of the law prevailing in other jurisdictions, particularly when the substantive law of the forum state would have the effect of enforcing the objectives of such safety covenants and fostering the public policy inherent in such safety covenants and in federal legislation concerning aviation and aid to airports?

3. Is there an overriding federal interest in the regulation of aeronautical interstate commerce that preempts at least to a limited degree state laws concerning local sovereign immunity, so that a county which has entered into Grant Agreements with the F.A.A. under the aegis of the Airport and Airway Development Act (49 U.S.C. §§ 1701, *et seq.*) and has

received significant federal funding of county airport improvements, is precluded from asserting sovereign immunity as a bar to suits brought by aeronautical users of the county airport, as third party beneficiaries, for negligent breach by the county of safety covenants contained in the Grant Agreements, when such safety covenants ex facie are intended for the benefit of aeronautical users of the airport, and particularly when the denial of sovereign immunity to the county under such circumstances would have the effect of enforcing the objectives of such safety covenants and fostering the public policy inherent in the federal regulation of aviation and would also result in nationwide uniform interpretations of federal aviation legislation?

4. As both municipalities and counties in Georgia have the identical authority to engage in the same proprietary function of owning and operating public airports, and as both municipalities and counties are eligible on an equal basis for Grant Agreements and federal funds under the Airport and Airway Development Act (49 U.S.C. §§ 1701, *et seq.*), and as under Georgia law a governmental entity in the form of a municipality has no sovereign immunity from suits arising from municipal ownership and operation of public airports, and as there are no rational or legitimate distinctions and differences between the proprietary function of a municipality in owning and operating a public airport and the proprietary function of a county in owning and operating a public airport, do the decisions below, which provide a county with absolute sovereign immunity, serve to create an irrational, arbitrary and unreasonable judicial classification of the types of local governmental entities that can be sued for wrongs committed during the course of

operating an airport, in violation of petitioner's equal protection and due process rights under the Fourteenth Amendment of the United States Constitution, or alternatively, under the facts of and as applied to this case, does Georgia Code Section 23-1502 in and of itself constitute an irrational, arbitrary and unreasonable legislative classification of the types of local governmental entities that can be sued for wrongs committed during the course of operating an airport, in violation of petitioner's equal protection and due process rights under the Fourteenth Amendment of the United States Constitution?

STATUTES INVOLVED

The "Rules of Decision Act," 28 U.S.C. § 1652, is relevant to the questions presented by this petition. That Act provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

* * *

The following portions of the Airport and Airway Development Act, 49 U.S.C. §§ 1701, *et seq.*, are also involved:

"§ 1701. Congressional declaration of policy.

"The Congress hereby finds and declares—

"That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

"That substantial expansion and improvement of the airport and airway system is required to meet the

demands of interstate commerce, the postal service, and the national defense.

"That the annual obligational authority during the period July 1, 1970, through June 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958, should be no less than $250,000,000.

"That the obligational authority during the period July 1, 1970, through June 30, 1980, for airport assistance under this chapter should be $2,500,000,000."

"§ 1711. Definitions.

"As used in this subchapter—

* * *

"(3) 'Airport hazard' means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft."

"§ 1713. Planning grants.

"(a) In order to promote the effective location and development of airports and the development of an adequate national airport system plan, the Secretary may make grants of funds to planning agencies for airport system planning, and to public agencies for airport master planning."

"§ 1714. Airport and airway development program.

"(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airport development by grant agreements with

sponsors in aggregate amounts not less than the following: . . ."

"§ 1716. Projection applications for airport development.

"(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches."

* * *

"(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

"(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

* * *

"(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met."

"§ 1718. Project sponsorship requirements; compliance; contracts between Secretary and

public agencies; air traffic control activities; relief of sponsors.

"As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

"(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

"(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

"(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

"(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

* * *

"(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection; . . ."

* * *

The following portions of the Georgia Uniform Airports Act, Georgia Code Sections 11-201, *et seq.*, are relevant here:

"11-201. Municipalities, etc., may acquire airports.

"Municipalities, counties, and other political subdivisions are hereby authorized, separately or jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties or other political subdivisions. . . ."

"11-205. Authority to equip, improve, establish fees and charges, lease, etc.

"Counties, municipalities, or other political subdivisions which have established or may hereafter establish airports or landing fields, or which acquire, lease, or set apart real property for such purpose or purposes, are hereby authorized:

"(a) To construct, equip, improve, maintain, and operate the same, or to vest authority for the construction, equipment, improvement, maintenance, and operation thereof, in an officer, board, or body of such political subdivisions. The expense of such construction, equipment, improvement, maintenance, and operation shall be a responsibility of said political subdivision.

"(b) Subject to existing contracts, to adopt regulations and establish charges, fees, and tolls for the use of such airports or landing fields, fix penalties for the violation of said regulations, and establish liens to enforce payment of said charges, fees, and tolls.

"(c) To lease such airports or landing fields to private parties for operation or to lease or assign to private parties for operation, space, area, improvements, and equipment on such airports or landing fields: Provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof."

"11-402. Definitions.

"As used in this Chapter, unless the context otherwise requires:

* * *

"(2) 'Airport hazard' means any overhead power line which interferes with radio communication between a publicly-owned aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off."

"11-403. Airport hazards not in public interest.

"It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking-off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare."

* * *

Georgia Code Section 3-108, which authorizes a breach of contract suit by a third party beneficiary, provides:

"3-108. Parties to actions on contracts.

"As a general rule, the action on a contract, whether express or implied, or whether by parol or

under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

* * *

Georgia Code Section 23-1502, which the courts below construed as supplying counties with carte blanche sovereign immunity in all cases and under all circumstances, provides:

"23-1502. When country liable to suit.—

"A county is not liable to suit for any cause of action unless made so by statute."

STATEMENT OF THE CASE

On February 26, 1973, after receiving clearances from the F.A.A.-operated control tower, a Learjet Model 24 aircraft, F.A.A. Registration No. N-454RN, owned by Southeast Machinery, Inc. and operated by Machinery Buyers Corp., made an IFR takeoff from Runway 20L at DeKalb-Peachtree Airport, Atlanta, Georgia. Immediately after becoming airborne, and while within the boundaries of the airport and at an altitude of approximately 400 feet, the jet engines of said aircraft ingested a large number of starlings or similar birds, resulting in a sudden loss of power in both engines and the crash and total destruction of said aircraft and the death of all seven persons aboard the aircraft. (R. 8-9)

After the crash the remains of many dead birds were found at or near the departure end of Runway 20L, and

bird remains and particles of protein matter were found on the airplane windshield and center post and in the airplane engines. Also, immediately prior to and after the crash large flocks of birds were located in and about the Airport boundaries and the adjacent garbage dump operated by DeKalb County. (R. 12) The sole physical cause of the crash was loss of engine power in both jet engines, resulting directly and solely from the ingestion of birds in the engines. (R. 9)

Petitioner Fireman's Fund Insurance Company, which provided hull insurance to Southeast Machinery with respect to Learjet N-454RN, paid its insured for the hull loss and then filed this suit against respondent DeKalb County and the United States of America to recover for the $549,432.00 hull subrogation interest. (R. 12-13) Jurisdiction over DeKalb County was based on diversity of citizenship and jurisdiction over the U.S.A. was based on the Federal Tort Claims Act. (R. 8)

As amended, the complaint against DeKalb County alleged three principal claims: negligence; maintenance of public and private nuisance; and breach of certain grant agreements entered into between DeKalb County and the F.A.A. concerning development of the county-owned and operated airport. (R. 5-36)

In this case and in four other cases resulting from the catastrophe the District Court granted motions to dismiss filed by DeKalb County, on the theory that the concept of sovereign immunity barred any claims against DeKalb County. (Appendix C, *infra*, p. 35a.)

Petitioner (and plaintiffs in the other four cases) appealed to the Fifth Circuit Court of Appeals from

the order dismissing respondent DeKalb County, and on January 30, 1976 the initial Fifth Circuit panel of Circuit Judges Godbold, Dyer and Morgan issued a decision reversing the District Court dismissal order. (Appendix B, *infra*, p. 17a.) This initial Fifth Circuit decision held that DeKalb County was entitled to sovereign immunity as to petitioner's negligence and nuisance claims, but that sovereign immunity did not bar the breach of contract claim based upon petitioner's status as a third party beneficiary of the savety covenants imposed upon DeKalb County by the F.A.A. in certain Grant Agreements. Circuit Judge Dyer dissented from the portion of the decision holding that petitioner could sue for breach of contract. The basis for his dissent was that federal common law applied to the breach of contract claim and that under federal common law petitioner lacked standing to sue as a third party beneficiary.

Thereafter, respondent DeKalb County moved for rehearing en banc and on April 5, 1976 rehearing en banc was granted. (Appendix B, *infra*, p. 17a.) On August 25, 1976, the Fifth Circuit sitting en banc, in an eight to five decision, adopted Circuit Judge Dyer's earlier dissent and in effect ruled that DeKalb County was entitled to sovereign immunity as to *all* of petitioner's claims, including the breach of contract claim. (Appendix A, *infra*, p. 1a.) The five dissenting members of the en banc Court were Chief Judge Brown and Circuit Judges Goldberg, Ainsworth, Godbold and Morgan, and they urged that petitioner did have standing as a third party beneficiary to sue for DeKalb County's breach of the Grant Agreements. Four of the dissenting judges of the en banc court also argued that federal common law did not apply to the case.

Petitioner seeks a writ of certiorari from this Honorable Court to review the eight to five en banc rehearing decision of the Fifth Circuit.

As the decision in question was entered with respect to respondent DeKalb County's motion to dismiss, it is necessary for this Court generally to be aware of the relevant allegations of petitioner's complaint, which allegations are set forth below.

Prior to the crash, DeKalb County had actual knowledge that birds could be ingested into jet engines, and that jet engine bird ingestion could cause an engine failure and crash. DeKalb County also had actual knowledge that a dangerous bird hazard, bird problem and bird-attracting garbage dump existed at the Airport. (R. 12)

Pursuant to the authority and directions of Congress, the F.A.A. prior to the crash in question had issued Advisory Circular No. 150/5200-3A, dated March 2, 1972, entitled "Bird Hazards to Aircraft," in which the F.A.A. stated in part as follows:

> "Migratory birds, particularly waterfowl, are a hazard to aircraft due to their size and weight. In recognition of this potential hazard, F.A.A. Air Traffic Control and Flight Service Station facilities issue advisory information on bird activities when they are reported or when they have knowledge of such activities. Information given to pilots includes the position, species or size of bird if known, and their course and altitude." (R. 18)

To cope with such bird hazards, the Advisory Circular states that the F.A.A. operates as follows:

> "F.A.A. Air Traffic Control and Flight Service Station facilities coordinate with airport manage-

> ment for either appropriate alerting action by a Notice to Airmen when flocks of birds are noted to remain in the airport vicinity or for possible closing by a Notice to Airmen when flocks roost on runways." (R. 18)

Public knowledge of the hazards of birds to aircraft has existed at least since the 1940's, when the F.A.A. published a report containing detailed statistics on the collision of aircraft with birds, which report was admitted into evidence in *Rapp v. Eastern Air Lines, Inc., U.S.A., et al.*, 264 F.Supp. 673 (E.D. Pa. 1967), and which report included 1946 statistics on bird strikes by aircraft, there being more than one such strike per day during this early aviation period. (R. 20)

DeKalb-Peachtree Airport is located in DeKalb County on land owned by the County, and the Airport is owned, operated, managed and maintained by the County. The Airport has paved runways, hangars, servicing and parking facilities, a control tower with radio facilities, an instrument landing system control center, and access to other radio and navigational aids. The Airport is operated by the County for the public welfare and benefit of all citizens and is subject to the jurisdiction of the F.A.A. (R. 21)

DeKalb County acquired the Airport by way of quitclaim deed from the United States General Services Administration in 1960. Since 1966 DeKalb County has utilized the Airport site for dumping raw garbage. (R. 21) Employees of DeKalb County at the Airport have observed and reported a significant increase in the number of birds at the Airport following the utilization of the Airport site for raw garbage disposal. (R. 21)

The untreated raw garbage, refuse, trash, offal, filth and other waste material deposited by DeKalb County

on the Airport created a large area constituting an attraction to birds and causing huge flocks of birds to congregate about the Airport, the runways, ends of runways and other areas within the Airport boundaries. The attractiveness of the open garbage dump to birds was increased by the failure of DeKalb County to remove trees, undergrowth and high grass from the area of the open garbage dump and along the runways, which foliage provided roosting, nesting and basking areas for the large flocks of birds attracted to the garbage dump. The birds at times remained, walked and ran upon said runways and adjacent grass areas at the sides and ends of the runways, and congregated in the numerous trees on and about the Airport area. The birds when located upon the Airport grounds often flew aloft in large flocks many times each day as aircraft would take off, approach, land or fly near said Airport. The flocks of birds at the Airport constituted a continuous hazard to the safety of aircraft and to the safety and lives of the crews and passengers therein and to persons residing and located upon the ground in the vicinity of the Airport. (R. 22)

Beginning in June, 1962, the Federal Government entered into six Grant Agreements with DeKalb County, pursuant to which at least $1,025,224.06 was paid to the County for the purpose of assisting the County in the improvement and development of DeKalb-Peachtree Airport. (R. 23) Associated with the various Grant Agreements is an airport layout plan developed by DeKalb County and approved by the F.A.A. graphically illustrating the development and proposed development of the airport facilities and the use of the land included within the airport boundaries. Such use does not include an open garbage dump or

any other dumping ground for garbage. (R. 23)

Prior to the crash in question, the F.A.A. recognized that the existence of the open garbage dump at the Airport constituted an attraction to huge flocks of birds, and that such birds constituted a definite hazard for aircraft taking off and landing at the Airport. (R. 24) From March 9, 1970, to February 14, 1972, the F.A.A. communicated with DeKalb County, both by letter and by conference, relative to alleviation of the bird hazard caused by the existence of the open garbage dump on the Airport site. In February, 1971, the F.A.A. was advised by DeKalb County that the dump would be closed by August, 1972, but DeKalb County did not close the dump and the hazard continued. (R. 24)

The Grant Agreements entered into between the F.A.A. and DeKalb County under the Airport and Airway Development Act imposed the following obligations on DeKalb County:

> "The Sponsor [DeKalb County] will keep up to date at all times an airport layout plan . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to approval of the F.A.A., which approval shall be evidenced by the signature of a duly authorized representative of the F.A.A. on the face of the airport layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (R. 25)

As previously noted, the airport layout plan made no mention of an open garbage dump on the Airport. The

Grant Agreements also imposed the following specific covenants on the County:

> "These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, . . ."
>
> "The Sponsor will operate the Airport as such for the use and benefit of the public. . . . The Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public."
>
> "The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes."
>
> "In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land."
>
> " . . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport."
>
> "Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict

> the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft." (R. 25-26)

DeKalb County violated the Grant Agreement covenants by willfully permitting the existence of an open garbage dump and bird hazard on the Airport site and adjacent to Runway 20L. The covenants ex facie were intended for the benefit and safety of aeronautical users of the Airport, and petitioner's insureds were third party beneficiaries of said Grant Agreement covenants. Accordingly, DeKalb County is liable for breach of such Grant Agreement covenants. (R. 26)

By reason of the existence of the open garbage dump prior to and on February 26, 1973, the operation of the Airport by DeKalb County constituted a public and private nuisance and a hazard to public safety, and the maintenance of the open garbage dump at the Airport constituted an airport hazard as defined in 49 U.S.C. § 1711, and was a violation of 49 U.S.C. § 1718(3). (R. 26-27)

The reckless nature of the negligence and dereliction of duties of DeKalb County is exemplified by the fact that prior to the fatal crash in question, DeKalb County had received notices of several airplane bird-strike and near bird-strike incidents within the airport boundaries, but despite this knowledge of prior incidents DeKalb County failed to take any action at all to prevent a recurrence of such incidents. (R. 32)

The Airport is not owned, operated, managed and maintained by DeKalb County as a governmental function or enterprise, but, instead, is owned, operated, maintained and managed by DeKalb County as a pro-

prietary or ministerial function or enterprise. DeKalb County leases substantial portions of the Airport to private companies engaged in commercial operations for profit; some of such leases are for fixed rental amounts plus a percentage of the revenues or income derived by the tenants from their commercial operations; the revenues thus obtained by DeKalb County are not insignificant, but are substantial; and the Airport is owned, operated, managed and maintained by DeKalb County primarily as a source of revenue for the County. In effect, with respect to the ownership, operation, management and maintenance of the Airport, DeKalb County acts as a private landlord and not as a governmental entity. (R. 32-33)

Prior to the accident, DeKalb County purchased a liability insurance policy providing bodily injury liability insurance and property damage liability insurance with respect to the ownership, operation, management and maintanance of the Airport, and such insurance applies to petitioner's claims. Such insurance contains a "Waiver of Governmental Immunity" rider which provides as follows:

> "It is agreed that the Company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental functions." (R. 33, 130)

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Existing Conflict As To Whether Federal Common Law or State Law Determines The Standing of Private Litigants As Third Party Beneficiaries To Sue Non-Federal Entities For Breach of Grant Agreements Entered Into With The Federal Government.

The first reason why the petition for a writ of certiorari should be granted is that this Court should resolve the sharp conflict existing in the lower federal courts as to whether federal common law or *Erie*-Interpreted forum state law determines the standing *vel non* of private litigants, as third party beneficiaries, to sue non-federal entities for breach of contracts entered into between such non-federal entities and the Federal government.

The existence of this conflict is apparent from the en banc decision below.

The majority of the en banc Court held that in this diversity of citizenship case federal common law controlled the question of whether petitioner had standing as a third party beneficiary to sue for breach of the Grant Agreement covenants. This opinion was based upon the following considerations: the United States was a party to the contract; the contract was entered into pursuant to authority conferred by a federal statute; and there was a need for "uniformity of decision" in construing "federal" contracts. (See Appendix B, *infra*, p. 17a.)

Four of the five Circuit Judges who dissented from the en banc decision argued that federal common law was not applicable, that *Erie* required application of

the substantive law of the forum state, and that under Georgia law petitioner clearly had standing to sue as a third party beneficiary. As support for their position, such dissenting Circuit Judges pointed out that although the United States was a party to the contract and was also a party to the litigation, the third party beneficiary controversy did not involve the United States and did not have any impact on federal fiscal policy, and therefore there was no compelling need for uniformity of decision. For these reasons, such Circuit Judges felt that the third party beneficiary question presented a purely local controversy between non-federal parties, and that the mandate of *Erie* should be followed.

It may be observed from the decision below that both the dissenting Circuit Judges and the Circuit Judges comprising the en banc majority found support for their opposing positions in obviously conflicting Federal Court decisions.

A genuine and substantial controversy thus clearly exists as to when and under what circumstances federal common law, or *Erie*-interpreted state law, applies to determine the standing of non-federal litigants, as third party beneficiaries, to sue other non-federal litigants for breach of contracts made with the United States, and in view of the wide range of currently existing federal aid programs and related "federal" contracts, this controversy is not likely to subside. A definitive decision by this Court is needed to resolve this controversy and conflict of opinion.

II. The Decision Below Is Erroneous And Is In Irreconcilable Conflict With Both Federal Common Law And State Law.

The second reason why this petition for a writ of certiorari should be granted is that the decision below is erroneous and is in direct, head-on conflict with both federal common law and state law, *regardless of which law is applicable.*

Considering first the area of federal common law, in *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1971), the Ninth Circuit carefully studied the type of F.A.A. Grant Agreements involved here and statutory and contractual covenants similar to those relied upon by petitioner, and concluded that such covenants were in fact intended to confer a benefit upon third parties and that such third party beneficiaries had the requisite standing to sue for breach of the covenants, assuming any relevant administrative remedies had been exhausted. 415 F.2d 954-956.[3]

The Seventh Circuit Court of Appeals has also indicated that private, non-contracting parties "may qualify as intended beneficiaries" under the particular Act and type of F.A.A. Grant Agreements involved here. See *Luedtke v. County of Milwaukee,* 521 F.2d 387, 391 (7th Cir. 1975). *Cf.*, the District Court and Circuit Court decisions in *Town of New Windsor v. Ronan,* 481 F.2d 450 (2nd Cir. 1973), and 329 F.Supp. 1286 (S.D.N.Y. 1973).

And in the landmark airplane-bird ingestion case, *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673

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[3] There is no issue of exhaustion of administrative remedies in the case at bar.

(E.D. Pa. 1967), the District Court's judgment of tort liability in favor of private, non-contracting parties and against the defendant (who was a party to Grant Agreements) was based in large part upon the defendant's breach of duties and obligations imposed by F.A.A. Grant Agreements identical to the ones involved here.

The decision below is in irreconcilable conflict with the decisions in *City of Inglewood*, *Luedtke* and *Rapp*.

The decision below is also in direct conflict with other decisions of the Fifth Circuit Court of Appeals. In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), it was held that black children were third party beneficiaries of anti-discrimination covenants contained in federal aid grant agreements between the local school board and H.E.W., and that such children had standing as third party beneficiaries to sue the local school board for breach of such covenants. And in *Seaboard Air Line R.R. v. Crisp County, Georgia*, 280 F.2d 873 (5th Cir. 1960), *cert. denied*, 375 U.S. 942 (1961), the Fifth Circuit held that a private party should be allowed to maintain a tort-damage action against a Georgia county because the Federal Power Act and a license granted to the County under such Act imposed a duty on the County to protect the property of private third parties.

In concluding that petitioner lacked standing as a third party beneficiary to sue for breach of the Grant Agreement covenants, the Court below not only failed to recognize and follow the federal common law explicit in the cases discussed above, but applied the wrong test to determine whether plaintiff possessed standing as a third party beneficiary.

The Court below held that under federal common law the test of standing as a third party beneficiary was whether the "federal" contract itself clearly manifested an intent to compensate the third party in damages in the event of a breach. *This measure or test of standing was not distilled from decisions of this Court or from decisions of other Federal Courts.* Instead, this test of standing was derived from the forty-four year old First Restatement of Contracts, *and it is clearly an erroneous and inapplicable test.*

Under federal common law, the true measure of standing as a third party beneficiary is a three-pronged test: (1) does plaintiff's personal stake in the case satisfy the concrete adverseness required by Article III of the Constitution? (2) does plaintiff fall within the class of persons or zone of interests intended to be benefited or protected by the contractual or statutory provisions in question? and, (3) does the contract or statute in question preclude suit or judicial review? See *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 955 (9th Cir. 1971); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970); and *Barlow v. Collins*, 397 U.S. 159, 164-165 (1970).

Petitioner's claims herein clearly measure up to these three yardsticks. Petitioner's injury is not imaginary, but is real and immediate. And petitioner falls within the class of persons intended to be protected by the statutory and contractual covenants in question, as such covenants on their face are intended to protect, and provide for the safety of, "aeronautical users of the Airport."

Last, neither the Grant Agreements nor the Airport

and Airway Development Act, nor the legislative history of such Act, preclude petitioner's claims against DeKalb County. To the contrary, allowance of petitioner's claims can serve only to foster and enforce the United States' expressed concern for aviation safety and the public policy considerations inherent in the Act and Grant Agreements in question.

It is thus apparent that the decision below is erroneous and is in direct and irreconcilable conflict both with federal common law, with decisions from other Federal courts, and with the public policy considerations plainly expressed in the Act and F.A.A. Grant Agreements.

Turning now to state law, if federal common law does not govern the question of whether petitioner has standing as a third party beneficiary to sue for breach of the Grant Agreements covenants in question, then *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938), obviously dictates that the substantive law of the forum state must govern such question. Fortunately, Georgia law on the subject is not difficult to ascertain.

Georgia Code Section 3-108 provides: "The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

In *Sheppard v. Bridges*, 137 Ga. 615, 74 S.E.2d 245 (1912), the Georgia Supreme Court held that "the great weight of authority is to the effect that if the promise is made for the purpose of conferring a benefit on a person, though he be not a party to the contract, or furnish the consideration for the promise, he can bring suit upon it." To the same effect are *Holland v. Phillips*, 94 Ga.App. 361, 94 S.E.2d 503 (1956); *Smith*

v. Ledbetter Brothers, Inc., 111 Ga.App. 238, 141 S.E.2d 322 (1965); *M. R. Thomason & Associates v. Wilson*, 125 Ga.App. 658, 188 S.E.2d 805 (1972); and *State Construction Company v. Johnson*, 88 Ga.App. 651, 656, 77 S.E.2d 240 (1953).

The Georgia law regarding third party beneficiaries of contracts also applies to suits against counties. To demonstrate this point we need only refer to the full bench decision of the Georgia Supreme Court in *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966):

> "Counties are empowered to sue or be sued in any court. Code § 23-1501, but 'a county is not liable to suit for any cause of action unless made so by statute.' Code § 23-1502. However, an exception exists where a county breaches a contract it was authorized by law to undertake. . . . 'Whenever a county is made liable by statute for a demand, or is authorized by statute to contract, and in pursuance of such power does contract, *then an action will lie against it to enforce such liability, or to enforce any rights growing out of such contract*, although there is no statute expressly authorizing the bringing of an action for such purpose. . . . In other words, a county can always be sued upon any liability against it created by statute, or for breach of any valid contract which it is authorized by law to make.'
>
> " 'Liability to suit may be shown by indicating that the claim arises . . . as an incident in the performance of an undertaking by the county authorized by statute.' " *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966). (Emphasis added.)

See also *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 865, 118 S.E.2d 234 (1960) (involving the very same airport and very same county involved in

this litigation); *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973) (in which the Georgia Supreme Court upheld a death claim against a county based upon a tort arising out of breach of contractual commitments between the county and Georgia Power Company); and *Seaboard Air Line R.R. v. Crisp County, Georgia*, 280 F.2d 873, 877-878 (5th Cir. 1960), *cert. denied* 375 U.S. 942 (1961) (in which the Fifth Circuit held: "Here the County was under a duty imposed by the Federal Power Act to protect the Seaboard's property, and thus the Act created a tort liability.")

From the foregoing, it cannot be denied that if federal common law does not apply to the question at hand, then the decision below is plainly erroneous and in irreconcilable conflict both with the mandate of *Erie R.R. v. Tompkins* and with the decisions of the highest appellate courts of Georgia.

Summarizing, this Court should grant the requested writ of certiorari, because:

(a) If federal common law applies to the question under consideration, then the decision below is in irreconcilable conflict with the federal common law expressed in the decisions of other Federal Courts (including Circuit Courts of Appeal), and with the public policy inherent in the Act and Grant Agreements in question; and

(b) If state law applies to the question under consideration, then the decision below is in irreconcilable conflict with the mandate of *Erie R.R. v. Tompkins* and with the law of Georgia.

III. The Paramount And Overriding Interest Of The Federal Government In Regulating All Phases of Aeronautical Commerce Preempts At Least To A Limited Degree Local Laws Concerning Sovereign Immunity.

The third reason why this petition for a writ of certiorari should be granted is that the paramount and overriding interest and activity of the Federal Government in regulating *all* phases of aeronautical commerce preempts and precludes, under the particular circumstances here involved, any reliance upon local sovereign immunity laws by respondent DeKalb County. In essence, by voluntarily engaging in an area of commerce regulated by the Federal Government, and by voluntarily soliciting and accepting federal funds and entering in Grant Agreements with the Federal Government, DeKalb County has waived any sovereign immunity with respect to claims arising from the County's federally regulated aviation activities.

In *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184 (1964), this Court held that when the States granted Congress the power to regulate commerce the States surrendered any portion of their sovereignty that would stand in the way of such regulation (377 U.S. 191-192), and that the States also waived their traditional sovereign immunity with respect to claims arising from voluntary activity by the States in the federally regulated area of commerce. (377 U.S. 192-198.)

Specifically, in overruling the state agency's sovereign immunity defense to the F.E.L.A. tort suit brought by plaintiffs in the *Parden* case, this Court ruled:

> "Moreover, such a result [sustaining of the sovereign immunity defense] would bear the seeds

> of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation . . . In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will." 377 U.S. 197-198.

Subsequent to this Court's ruling in *Parden* the Circuit Courts of Appeal have consistently overruled sovereign immunity defenses relied upon by state agencies engaged in various areas of activity regulated by Congress. *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971) (by engaging in activity of paramount federal interest a state may waive its sovereign immunity, and whether such waiver has occurred is a question of federal law); *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied* 400 U.S. 829 (1970) (in the realm of interstate commerce congressional authority is supreme and overrides any state interest in sovereign immunity with respect to rights and remedies implicit in federal regulation); *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968) (by seeking and obtaining admission into federally regulated area of interstate commerce, and by obtaining permission to build and operate bridge and tunnel across bay, state agency waived any

sovereign immunity to federal court suit for damage to ship which struck submerged light tower).

From even a quick glance at the aviation laws and regulations promulgated by the various branches of the Federal Government, it is clear that aviation or aeronautical commerce is an extensively and pervasively federally regulated area of commerce, and that such federal regulation preempts any conflicting regulation by the states. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). As is evident from the Airport and Airway Development Act and the Grant Agreements in question here, such federal regulation extends to and completely encompasses the activity of local state agencies in operating and maintaining airports.

DeKalb County was not required to seek and obtain ownership of and operating rights to the Airport in question from the General Services Administration. DeKalb County was not coerced into seeking and obtaining $1,025,224.06 in federal aid under the Airport and Airway Development Act. And DeKalb County was not forced into signing Grant Agreements with the F.A.A. and in subjecting itself to federal regulation of airport and aviation activities.

DeKalb County *voluntarily* sought and obtained admission into a federally regulated area of interstate commerce, and thereby *as a matter of federal law* waived its sovereign immunity to the extent of private claims involving rights and remedies implicit in the federal regulation. To rule otherwise would impede substantially the federally expressed concern for aviation safety (and elimination of airport hazards) *explicit* in the Act and Grant Agreements in question.

At this juncture, we wish to point out that the cases discussed in this portion of our petition clearly hold that the waiver of immunity applies to traditional *tort* suits, as well as to suits for breach of federally imposed duties (contractual or otherwise).

The decision below fails to apply the *federal law* discussed above; is in head-on conflict with the rulings of this Court and other Federal Courts concerning waiver of immunity; and if allowed to stand can serve only to burden interstate commerce and to thwart the explicit objectives of the Act and Grant Agreements in question.

For these reasons alone, this Court should allow review of the decision below.

IV. The Decision Below Has Resulted In An Unconstitutional Denial Of Equal Protection.

Under Georgia law DeKalb County's ownership and operation of the Airport is a proprietary—not governmental—activity or function. *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 854-55, 118 S.E.2d 234 (1960). Although Georgia *cities* are entitled to governmental immunity, it is clear that under Georgia law a *city* can be sued in tort for negligence resulting from the city's proprietary activity in owning and operating an airport. *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961); *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952).

The statutory authority for either a city or a county to engage in the proprietary activity of owning and operating an airport *is the same:* the Georgia Uniform Airport Act, Georgia Code Sections 11-201, *et seq.* And both cities and counties are eligible on an equal basis for federal aid under the Airport and Airway Develop-

ment Act. Last, a review of Georgia airport legislation and the Georgia cases cited above demonstrate that there are *no distinctions or differences* between the proprietary operation of an airport by a city and the proprietary operation of an airport by a county.

Thus, if Georgia Code Section 23-1502 is construed to bar petitioner's claims against DeKalb County, the result would be the creation of a scheme of classification that would allow suits against some local governmental entities for the negligent proprietary operation of airports but would prohibit identical suits against other local governmental entities for the identical negligent proprietary operation of identical airports. *This is precisely the effect of the decision by the Court below.*

There is no legitimate or rational basis or reason for a legislative or judicial scheme of classification that has the effect of allowing prosecution of the former type of suit but disallows prosecution of the latter type of suit, and such scheme of classification is patently unconstitutional as a denial of equal protection and due process. [The constitutional guarantees of equal protection and due process apply to judicial interpretations of statutes, as well as to legislative enactments. *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930).][4]

Any scheme of classification " . . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920). See also, *Levy v. Louisiana*,

[4] These constitutional arguments were presented to the Court below, but were disregarded. See petitioner's brief in advance of en banc hearing.

391 U.S. 68 (1968), and *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) (in which cases this Court struck down as unconstitutional state laws and rules that created arbitrary classes of persons who could maintain wrongful death actions).

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administrated by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

The constitutional infirmity in the scheme of classification contended for by DeKalb County and created by the decision of the Court below is revealed clearly by the fact that if the City of Decatur (the county seat), rather than DeKalb County, was the owner and operator of the Airport, the issue of sovereign immunity would not be involved in this case.

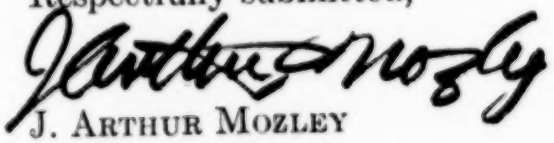
The right to have a claim adjudicated by a court and jury on a basis equal with others similarly situated is a fundamental right. The decision below has created an arbitrary and unconstutitional scheme of classification that deprives petitioner of such right. Such decision also imposes an unconstitutional burden on interstate commerce, in that injured interstate aeronautical travellers may or may not be afforded access to the courts of the land, dependent upon the totally fortuitous circumstance of whether the involved airport is owned by one type of local governmental entity rather than another.

A writ of certiorari should issue to correct these constitutional infirmities in the decision below.

CONCLUSION

For all of these reasons, petitioner asks that a writ of certiorari be issued and that this Honorable Court review and reverse the judgment of the court below.

Respectfully submitted,



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November 19, 1976

CERTIFICATE OF SERVICE

I, J. Arthur Mozley, attorney for Petitioner Fireman's Fund Insurance Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of November, 1976, I served three true copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the respondents and all parties, by depositing in a United States mailbox true copies of said petition, with first class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

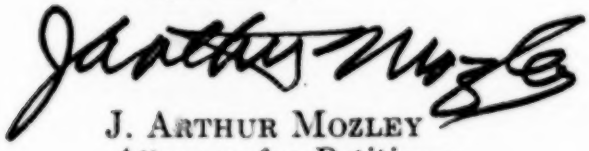
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Respectfully,



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APPENDICES

APPENDIX A

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,

v.

U.S.A.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.

DEKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants-Appellees.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870 and 74-3881.

United States Court of Appeals, Fifth Circuit.

Aug. 25, 1976.

Appeals from the United States District Court Northern District of Georgia.

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

The Court en banc adopts as its opinion Parts I, II, and IV of the majority panel opinion in this cause, 526 F.2d 679-686. The Court en banc adopts as its opinion the dissenting opinion of Judge Dyer, 526 F.2d 686-688 in lieu of Part III of the majority panel opinion. While not directly in point, the Court has reviewed the case of *United States v. Orleans*, ___ U.S. ___, 96 S.Ct. 1971,

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* Because of illness Judge Wisdom did not participate in the hearing or the consideration of this case. Judge Thornberry was a member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

48 L.Ed.2d 390. The reasoning of the dissenting opinion, adopted here, is remarkably consistent with the policy considerations noted by the Chief Justice in *Orleans*.

Accordingly, the judgment of the district court is

AFFIRMED.

TJOFLAT, Circuit Judge (concurring).

I agree that, in general, government contracts, and especially those having to do with the airways, should be controlled by federal law. *See generally Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied sub nom., Forth Corp. v. Allegheny Airlines, Inc.*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 470 (1975). *See also* Federal Aviation Act of 1958, §1108(a), 49 U.S.C. §1508(a) (1970). I also agree that the public was not an intended third-party beneficiary of the contract assurances mandated by 49 U.S.C. §1110, *now enacted at* 49 U.S.C. §1718 (1970). Consequently, I concur.

LEWIS R. MORGAN, Circuit Judge, with whom JOHN R. BROWN, Chief Judge, and GOLDBERG, AINSWORTH and GODBOLD, Circuit Judges, join (dissenting):

The court *en banc* adopts as its decision Parts I, II, and IV of the majority panel opinion, which held that under Georgia law plaintiffs could not recover against defendant DeKalb County under a theory of negli-

gence,[1] of nuisance, or of waiver of immunity through the County's purchase of liability insurance. The majority *en banc* also adopts Judge Dyer's dissent in the original panel opinion in lieu of Part III of that same opinion. In Part III, the majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. Through its adoption of Judge Dyer's dissent, however, the majority *en banc* holds that suit as third party beneficiaries is likewise unavailable to plaintiffs and that, accordingly, their entire action was properly dismissed.

DeKalb County entered into an agreement with the FAA whereby in return for a grant of money by that agency, it gave the FAA certain assurances, among which were its promises that it would operate the airport for the use and benefit of the public, maintain it in a safe and serviceable condition, and limit use of adjacent land so that it would not interfere with the safe use of the airport. *Miree v. United States*, 5 Cir., 526 F.2d 679 at 686, n.12. The majority panel opinion held that under Georgia law plaintiffs could sue as third party beneficiaries for the County's alleged breach of its contractual duties.[2] Judge Dyer's dissent, which the

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[1] While plaintiffs presented abundant evidence to make out a prima facie case of negligence against defendant in the operation of the DeKalb-Peachtree Airport, an analysis of applicable Georgia case law indicated that DeKalb County was immune from suit under a theory of negligence.

[2] Specifically, through the County's continued operation of the county garbage dump, which lay adjacent to the airport, large numbers of birds swarmed over the airport and created allegedly hazardous conditions. It was the ingestion of a large number of these birds into the air intake system of the airplane's engine that allegedly caused the crash in question.

court *en banc* now adopts, argued that federal common law, not Georgia law, should control the interpretation of third party beneficiary rights under a contract entered into by the United States Government and other parties. We respectfully dissent.

I. Inapplicability of Federal Common Law.

After *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), in which the Supreme Court held that in diversity cases [3] state law generally shall apply, it became clear that federal general common law no longer existed. Yet, with the much publicized *Clearfield Trust Co. v. United States*,[4] 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1973), it became clear that federal common law, as opposed to federal *general* common law, still lived. In *Clearfield*, a check drawn on the United States Treasurer payable to a named government employee was stolen and forged and the Clearfield Trust Company paid the check over the forged endorsement. In determining that federal common law, not state law, applied, the Supreme Court held that rights and duties of the United States on commercial paper that it issues should not be controlled by local law. That is, "the issuance of commercial paper by the United States is on a vast scale and trans-

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[3] Justice Brandeis' exact words were: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law." 304 U.S. at 78, 58 S.Ct. at 822.

[4] Actually, on the same day that *Erie* was announced, Justice Brandeis held that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202 (1938).

actions in that paper . . . will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. . . . The desirability of a uniform rule is plain." *Id.* at 367, 63 S.Ct. at 575. Hence, the rationale supporting the *Clearfield* decision is that when the rights and duties of the United States are to be determined, uniformity of result is desirable. *Accord, United States v. Standard Oil*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947) (indemnification of Government for injury to its soldier is matter of federal fiscal policy that demands uniform result).

It seems quite clear to us then that absent explicit Congressional command, federal common law should be chosen in a diversity case only when there exists an identifiable federal interest in the outcome of the particular case or in a consistent result in cases of its class. Such an interest is not involved in this case. Here, we have litigation between two non-federal parties over the rights of one as a third party beneficiary to a contract executed by the other. While the federal government was a party to this contract, it has no particular interest in the outcome of the third party beneficiary question in this diversity suit.[5] Such a question is a matter to be decided by the particular state's own contract law. Indeed, whether or not the plaintiffs could recover as third party beneficiaries is of no significance to the United States in that it affects no rights or liabilities of

[5] To the extent that the United States would have any interest in the outcome, its interest would favor recovery by the plaintiffs, in that the United States required the County to promise to maintain safe conditions at the airport. Unless the United States intended this to be an empty promise by the County, one would assume that it would favor a result encouraging the keeping of this promise. See Section II, infra.

the United States[6] and involves no impact on a federal fiscal policy.[7]

We find our approach supported by analogous Supreme Court cases. In *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), a diversity case in which the United States was not a party, the Supreme Court held that in litigation between two private parties over negotiation of federal bonds, state law controlled. The words of Justice Frankfurter are particularly appropriate for the present case:

> The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here . . . is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of the converter. *This is far too speculative, far too remote a possibility to justify the application of a federal law to transactions essentially of local concern.*

Id. at 33-34, 77 S.Ct. at 121. (Emphasis added.) Likewise, in *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966), the Supreme Court held that state law applies to a case between two private parties involving the assignment of an oil and gas lease given by the United States through the Mineral Leasing Act for Acquired Lands.

Clearfiel Trust Co. v. United States, supra.
United States v. Standard Oil, supra.

In rejecting the application of federal common law, the Court stated:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states . . .' Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern . . .
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> * * * * * *
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> Finally, *it is said that because the leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved. Apart from the highly abstract nature of this interest, there has been no showing that state law is not adequate to achieve it.*

Id. at 68-71, 86 S.Ct. at 1304, 16 L.Ed.2d at 373-74 (emphasis added). We find the present case to be analogous to both *Parnell* and *Wallis*. Like *Parnell* and

Wallis, this case involves litigation between private parties over a matter in which the federal government has been somewhat involved, but in which no issue of the rights and liability of the government is being litigated and in which no federal interest demanding a uniform disposition is involved.[8]

In addition to these Supreme Court precedents, we feel that there are several policy considerations that favor application of state law over federal common law in this case. First, there is the important consideration of comity between the state and federal governments deemed so important in *Erie*. As the Supreme Court has stated: "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. *The instances where we have created federal common law are few and restricted.*" *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605, 611 (1963) (emphasis added) (citation omitted). Here there exists a ready-made body of Georgia law on contract law, a subject well-disposed to adjudication through state law.[9]

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[8] Indeed, the three cases cited by Judge Dyer for the proposition that federal common law should apply involved situations in which the United States was either seeking indemnity or was itself suing for damages on a contract made between it and another party. *See Miree v. United States*, *supra*, at 686. Hence, in these cases the United States did have an identifiable interest in the outcome of the case that demanded an application of federal common law.

[9] We note that in several instances, the Supreme Court has applied state law in a suit brought in federal court for the reason that the matter is one of particular state concern and one on which the state has already developed a large body of law. For example, in *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), a suit brought by the United States to obtain payment of a loan made by the Small Business Administration, the Supreme

Second, we find the result in this case cruelly ironic in that through the application of federal common law, the majority preserves the County's immunity from suit by imposing a stricter test for third-party beneficiary standing than Georgia's own courts do. In view of the fact that the United States has enacted a complex scheme of federal aviation laws whose purpose is to promote air safety and that the Government in its contract with DeKalb County demanded assurances that the latter would maintain the airport in a safe condition, we cannot understand what federal purpose can possibly be served by conferring on DeKalb County greater immunity than its own state laws give it.

Finally, there is one other possible ramification of the case that could prove to be an unpleasant surprise for my brothers who join in the majority opinion: the expansion of federal jurisdiction. There was some concern that our holding in the original panel opinion expanded federal jurisdiction, that, carried to its logical conclusion, it would result in making a "federal case" out of a minor slip and fall accident at a county airport. The basis of that fear always seemed unclear, in that the present case is a diversity case, not a "federal question" case in which a particular holding could well expand

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Court applied state law on the issue of the female defendant's disability to contract, noting that the state had developed a body of law on the issue in question and that, absent an overriding federal interest, the state's interest in the matter should be respected. *Id.* at 352, 86 S.Ct. at 507, 15 L.Ed.2d at 410. Although the jurisdictional basis for it was the existence of a federal question, *DeSylva v. Ballentine*, 351 U.S. 570, 580-81, 76 S.Ct. 974, 979-80, 100 L.Ed. 1415, 1427-28 (1956), is in accord (state law, not federal law, determines the meaning of "children" under § 24 of the Copyright Act of 1947). We feel that the interest of the state in applying its own law governing third party beneficiary rights is equally compelling.

federal jurisdiction.[10] Therefore, whether we had held that Georgia law did or did not render the County liable on a third party beneficiary theory, the case was nevertheless a diversity case whose particular holding could not possibly expand or contract federal jurisdiction. Through the majority's holding that federal common law controls the entire interpretation of any contract entered into by the United States, however, it is quite possible that federal jurisdiction has been expanded. This is, "though the matter remains undecided by the Supreme Court, the better view is that a case 'arising under' federal common law is a federal question case, and is within the original jurisdiction of the federal courts as such." *C. Wright, Law Of Federal Courts* 250 (2d ed. 1970). Accordingly, it would seem that with this court's *en banc* decision there is now federal question jurisdiction over any claim made as a third party beneficiary to a contract involving the United States—a result that gives a much broader jurisdictional base than the present diversity basis alone.

For the above reasons, we believe the original panel opinion applying Georgia law to the question should be affirmed.

II. Third Party Beneficiary Suits Under Federal Common Law.

While we do not believe that federal common law should apply in this case, we also dissent from the majority's holding that such federal law would preclude plaintiffs' suits as third party beneficiaries. Judge Dyer cites the *Restatement (First) of Contracts*, §145

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[10] *E. g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

(1932) and seven cases—none of which derives from either the Supreme Court or this circuit—for the proposition that members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention that they be so compensated. *Miree v. United States, supra,* at 686-87. We contend that this authority is not persuasive in that the Restatement, now forty-four years old, antedates most of the major development of the third party beneficiary doctrine and that the seven cases cited are inapplicable to the present case.[11] Two cases out of the Fifth and Ninth Circuits that are much closer to the present case support our argument that federal common law should favor plaintiffs' recovery. In *Bossier Parish School Board v. Lemon,* 370 F.2d 847 (5th Cir. 1967), this court held that black children who were not allowed to attend the Bossier, Louisiana public schools could sue as third party beneficiaries under a contract between

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[11] None of these cases seem particularly applicable to the facts of this case. In two of the cases—*West v. Morrison-Knudson Company,* 451 F.2d 493 (9th Cir. 1971) and *Hensley v. United States,* 279 F.Supp. 548 (D. Mont. 1968)—the courts were utilizing *Montana* third-party beneficiary law. *Brotherton v. Merritt-Chapman and Scott Corp.,* 213 F.2d 477 (2d Cir. 1954), does not clearly state whether it is applying federal or state law, but, in any event, that case involved an incidental beneficiary. *Mahler v. United States,* 306 F.2d 713 (3rd Cir. 1962), was a tort case, not a third party beneficiary action. Two cases that disallowed third party suits—*Johnson v. Redevelopment Agency,* 317 F.2d 872 (9th Cir. 1963) and *Sayre v. United States,* 282 F.Supp. 175 (N.D. Ohio 1967)—were limited to the facts of their case, facts which included a comprehensive federal statutory scheme on redevelopment that precluded such suits. Finally, *Housing Corp. of America v. United States,* 468 F.2d 922, 199 Ct.Cl. 705 (U.S. Ct.Cl. 1972), denied a third party beneficiary action because the United States had fulfilled its duty under the contract and because a section of the contract explicitly prohibited third party beneficiary actions.

the United States and the Bossier Parish school system. Specifically, the United States Department of Health, Education, and Welfare had administered grants of two million dollars to the Bossier Parish school system, for which the school system gave various promises in return, among them the assurance that children of parents stationed at Barksdale Air Force Base could attend the public schools; the black children discriminated against in *Bossier* were children of such parents. Because *Bossier* was brought as a federal question suit, it is clear that the panel was applying federal common law when it held that the assurances given by the defendant in return for the United States grants made permissible a third party beneficiary suit by plaintiffs.

In a case even closer factually to the present case, the Ninth Circuit held that plaintiff, an adjacent city to the defendant airport, had standing to sue as a third party beneficiary to grant agreements made between an airport and the FAA. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). In that case, plaintiff, who alleged federal question grounds, sued for damages and injunctive relief arising from noise that resulted from operation of the Los Angeles International Airport. Reversing the district court in its holding that plaintiff could not sue as a third party beneficiary in that it was not an intended beneficiary of the grant agreement, the Ninth Circuit examined the legislative history of 49 U.S.C.A. §1110(4) [now 49 U.S.C.A.

§1718(4)],[12] pursuant to which the grant agreement was executed, and found that flight safety was not the sole purpose of the section, but that the welfare of persons living close to airports was also to receive protection. The court stated:

> If Los Angeles made the assurances required . . . in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. *Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary.* The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.

Id. at 956 (emphasis added). Of course, the facts in the present case do involve flight safety, as opposed to noise disturbance, but the Ninth Circuit's discussion in Inglewood makes it quite clear that such safety was the primary object sought by the grant assurances. Just as in *Inglewood*, in this case, it was not for the benefit of DeKalb County nor for the benefit of the FAA that the government required the County to promise that it would maintain the airport in safe operating condition. Obviously, the only parties that the assurance could possibly have benefited were those members of the

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[12] That section reads:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—
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> (4) appropriate action . . . has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and take-off of aircraft.

flying public who used DeKalb-Peachtree Airport. Accordingly, we contend that under federal common law plaintiffs were the intended beneficiaries of the grant agreement and should have been allowed to so sue.

III. Conclusion.

In summary, we feel that regardless of which law should be applied in this case, the result reached here is clearly incorrect. We have in this case plaintiffs suing a fully insured County against whom a strong prima facie case of negligence and breach of contract have been made. Under our interpretation of Georgia law, the law which we believe to be applicable here, plaintiffs could sue as third party beneficiaries to the grant agreement between the United States and DeKalb County.[13] We feel that the same result should obtain under application of federal common law. Yet, the majority applies a federal common law narrower in its allowance of recovery than Georgia law, the forum that should have the greater interest in determining whether its county should be immune from suit. In the face of a contract provision enacted at the insistance of the United States that requires DeKalb County to maintain a safe airport and of an extensive scheme of federal aviation laws whose purpose is to encourage safe airport operations, we cannot understand what federal interest is served by overruling Georgia law to defeat an action by these plaintiffs. We respectfully dissent.

JOHN R. BROWN, Chief Judge (dissenting):

I join in Judge Morgan's fine dissent. I have reservations about part I but these are not decisive of this case.

[13] *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973).

I emphasize that I believe federal, not state, law controls. This is an area in which there is a need for that consistency which can only be provided by uniform national standards—a consistency, in short, which requires the application of federal construction of federal contracts. Like Judge Morgan, however, I believe that federal law not only does not preclude the plaintiffs below from recovering as third party beneficiaries but that federal law compels this result.

To assert that Congress, in enacting 49 U.S.C.A. §1718(4), meant for contracts between the FAA and airports to benefit that countless multitude of taxpayers and land-locked citizens and to exclude those of the flying public—including peripatetic Judges whose airborne safety is central to them—is to say Congress was incongruous. Who else but the flying public—with or without life tenure (which after all lasts for this life only)—were they thinking of? The proof of the pudding, as this record indicates, is that the Federal Government, disturbed about the presence of garbage fed fowls, sought and obtained from the District Court an injunction against the continuance of this menace. In what name was this remedy invoked—in the name of the safety of the air traveling public. If the Government could, should, and did protect them from this hazard to their very temporal existence, how in the name of legalese can we conclude that the contract did not mean that fliers—or unfortunately, their successors, assigns, widows and orphans—while protected in a general sense, were not to be entitled to the only redress an aggrieved survivor has for such a contractual dereliction?

APPENDIX B

GEORGE HENSON MIREE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Third-Party Plaintiff-Appellee.

DEKALB COUNTY, GEORGIA,
Defendant-Appellee,

v.

MACHINERY BUYERS CORP., et al.,
Third-Party Defendants.

WILLIAM MICHAEL FIELDS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, et al.,
Defendants-Appellees.

PEARLIE CHAISSON,
Plaintiff-Appellee,

v.

SOUTHEAST MACHINERY, INC.,
Defendant and Third-Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third-Party Defendants-Appellees.

Nos. 74-3670, 74-3822, 74-3864, 74-3870, 74-3881.

United States Court of Appeals, Fifth Circuit.

Jan. 30, 1976.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

On February 26, 1973, a Lear Jet crashed shortly after takeoff from the DeKalb-Peachtree Airport. The alleged cause of the crash was the ingestion of a large number of birds swarming over the airport and adjacent county garbage dump. Damage was substantial; all passengers were killed, the plane was destroyed, an individual on the ground was severely injured by burning jet fuel that fell from the disabled plane shortly before crashing, and property at the crash site was extensively damaged. Separate actions were brought by the

passengers' survivors,[1] the burn victim,[2] the owner of the plane,[3] and the owner of the property at the crash site.[4] The various plaintiffs, suing in diversity, asserted theories of negligence, nuisance, and breach of contract. Defendant DeKalb County moved to dismiss on grounds that it was immune from suit under Georgia Law. Defendant's motion was granted, and the plaintiffs appealed.

I

[1] The plaintiffs present a prima facie case of negligence that would certainly survive a motion to dismiss in the absence of any immunity question. The essence of their claim is that large numbers of birds had flocked around the garbage dump adjacent to the airport for a considerable period of time, that the county was aware of the bird problem prior to the crash, and that birds had interfered with planes on prior occasions. All this, of course, is to no avail if counties are immune from being sued in negligence. Relying heavily on three cases, the plaintiffs contend that counties are not immune from negligence suits. First, they argue that the Uniform Airports Law (UAL)[5] was held to constitute a statutory waiver of *municipal* immunity in *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952), a case involving airport negligence. Next, they cite *Southern Airways v. DeKalb County*, 102 Ga.App. 850,

[1] In No. 74-3670, George Henson Miree, Claude Estes Miree, and Dorothy Estes Miree sue as survivors to their parents, Mr. and Mrs. Richardson F. Miree. In No. 74-3822, Judith Anita Phillips sues as survivor to her husband, David E. Phillips.

[2] No. 74-3864, *William Michael Fields v. DeKalb County, Georgia.*

[3] In No. 74-3870, Fireman's Fund Insurance Co. sues as assignee to Southeast Machinery's claim for destruction of the Lear Jet.

[4] No. 74-3881, *Pearlie Chaisson v. Southeast Machinery, Inc.*

[5] Ga. Code Ann. § 11-201, *et seq.*

118 S.E.2d 234 (1960), for the proposition that suits may be maintained against counties for breach of contract under the UAL, because operation of an airport is a proprietary function. Finally, they tie up the argument with a quotation from *Taylor v. King*, 104 Ga.App. 589, 122 S.E.2d 265 (1961), to the effect that for immunity purposes there is no distinction between municipalities and counties in cases involving airports authorized under the UAL. We must conclude, however, that when read in context of the surrounding case law and statutory framework, these cases stand for much narrower propositions.

An examination of the statutory bases of immunity for counties and municipalities reveals distinctly different provisions. County immunity is provided for in Ga. Code Ann. §23-1502. "A county is not liable to suit for any cause of action unless made so by statute." While almost as succinct in its language, the provision for municipal immunity in Ga. Code Ann. §69-301 is not nearly so unequivocal. "Municipal corporations shall not be liable for a failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable."

The operational distinction between these statutes has long been recognized by the Georgia courts. The second sentence of the municipal immunity statute has been consistently read to waive immunity whenever a municipality undertakes a proprietary function. Thus, in *Ware County v. Cason*, 189 Ga. 78, 79, 5 S.E.2d 339 (1939), the Georgia Supreme Court held a county hospital immune to suit even though prior cases had found

no immunity for city hospitals.

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. Code, §69-301; *Cornelisen v. Atlanta*, 146 Ga. 416 (91 S.E. 415). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital causing injury to a pay patient therein.

Accord, *Purser v. Dodge County*, 188 Ga. 250, 251-52, 3 S.E.2d 574 (1939).

It follows that the requirements for resisting immunity in cases involving municipal and county airports is significantly different. To sue a municipal airport, a plaintiff need only show that the operation of a municipal airport is a proprietary function; to sue a county airport, a plaintiff must show an express statutory waiver of immunity. When read in light of this distinction it becomes apparent that the extensive discussion of the UAL in *Caroway v. City of Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (1952), was not intended to demonstrate that the statute waived immunity. Rather, the intent was to demonstrate that, despite language in the UAL which could have been read to say that the operation of airports is a governmental function, the operation of an airport is a proprietary function, and, accordingly, is susceptible to suit.

In *Southern Airways v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960), the court made considerable use of the proprietary function discussion in *Caroway*,

but not, as suggested by the plaintiff, for the purpose of finding either that the UAL constitutes a statutory exception or that the county participation in a proprietary function waives immunity. Rather, the purpose of the court's inquiry into whether the operation of an airport constituted a proprietary function was to fit this case within the framework of a line of Georgia cases that allow County Commissioners to enter into binding contracts extending beyond their term of office only if the contract relates to a proprietary function of the county. *Id.* at 854-855, 118 S.E.2d 234.

On motion for rehearing the court in *Southern Airways* clarified its position as to the county's lack of immunity from suit on the contract. The court ruled that since the UAL expressly authorizes the county to contract, the logical inference of that statute is that the county may be sued for breach of contract. This is consistent with several other Georgia decisions which hold that statutory authority to contract is necessarily a statutory waiver of immunity to suit for breach. *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

Finally, an examination of *Taylor v. King*, 104 Ga. App. 589, 122 S.E.2d 265 (1961), reveals that the language relied upon by the plaintiffs was taken out of context. The *Taylor* case involved alleged negligence by a municipal airport. Accordingly, it was necessary for the plaintiffs to demonstrate that operation of the airport was a proprietary function to avoid immunity. Relying on the *Caroway* and *Southern Airways* cases, the court concluded that the operation of this municipal airport was a proprietary function. In the course of

its discussion of the *Southern Airways* case the court said: "For this purpose, there is no distinction between municipal and county liability." The antecedent to which "this purpose" refers is not, however, determination of immunity, as suggested by the plaintiffs, but only determination of whether or not an airport is a proprietary function.[6] An examination of the Uniform Airports Law reveals no language that even vaguely suggests that the legislature intended to waive county immunity for negligence in the operation of airports. Having been cited no other statutory authority, we necessarily must conclude that the county is immune from suit on theory of negligence.

II

The second theory propounded by the plaintiffs is that the county is liable for special damages resulting from the maintenance of a nuisance. The district court overruled this theory, holding that in the absence of statutory authority to be sued, the county is immune under Ga. Code Ann. §23-1502. In response, the plaintiffs assert that the requisite statutory authority to sue exists in Ga. Code Ann. §72-103.

> Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public did not participate, said special damage shall give a right of action.

In addition, they cite several Georgia cases holding a county liable for maintenance of a nuisance.

[2] Although several Georgia cases have held either a

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[6] *See also, City of Macon v. Powell*, 133 Ga. App. 907, 908, 213 S.E.2d 63 (1975).

municipality or a county liable for a nuisance, none has cited §72-103 as its authority for not holding the county immune. We could read this statute to create an exception to immunity only if we read "public nuisance" to mean a nuisance created or maintained by a public body. Ga. Code Ann. §72-102, however, defines public and private nuisance in terms of who is affected and who is injured, not in terms of the perpetrator of the nuisance. Thus, it must be concluded, that §72-103 does not create a statutory exception to the general rule of immunity. Rather, its function, like several comparable Georgia statutes,[7] is to create a cause of action for a particular kind of wrong.

There are, nevertheless, circumstances under which a county may be sued in nuisance. In both *Nalley v. Carroll County*, 135 Ga. 835, 70 S.E. 788 (1911), and *DeKalb County v. McFarland*, 223 Ga. 196, 154 S.E.2d 203 (1967),[8] counties were held liable for flood damage caused by a county public works project. Neither case, however, made clear its basis for finding the counties susceptible to suit. In *Baranan v. Fulton County*, 232 Ga. 852, 209 S.E.2d 188 (1974), the Georgia Supreme Court clarified the situation. The counties were not immune in those cases because Article 1, §3, para. 1 of the Georgia Constitution[9] provides that private property shall not be taken for public purposes without just and adequate compensation. The effect of the flooding was to take the plaintiffs' land for public purposes, thus

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[7] *See, e. g.*, Ga. Code Ann. § 105-103 which creates a cause of action for an ordinary tort.

[8] *See also*, later opinions in the *McFarland* case at 224 Ga. 618, 163 S.E.2d 827 (1968); 226 Ga. 321, 175 S.E.2d 20 (1970); 231 Ga. 649, 203 S.E.2d 495 (1974).

[9] Ga. Code Ann. § 2-301.

creating an action for compensation under the Constitution, and accordingly, an exception to §23-1502.[10]

[3] The injuries that occurred to the plaintiffs in the present case do not parallel those of the plaintiffs in *Baranan*, *McFarland*, or *Nalley*. In those cases land was rendered useless as the incidental result of a public project; the taking was an inevitable result of the public project, and the county knew or should have known that flooding would occur. The action was for compensation for land, the taking of which was necessary to the completion of the project. In this case, the injury to property resulting from the air crash is not a necessary and foreseeable consequence of maintaining a garbage dump and, consequently, not comparable to the flooding that results from river and drainage projects. Thus, we must conclude that there is no statutory exception under which these plaintiffs may sue the county for nuisance.

We reach this conclusion despite a line of cases that hold municipalities liable for personal injuries resulting from a continuing nuisance. *Town of Ft. Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968); *City of Blue Ridge v. Kiker*, 189 Ga. 717, 7 S.E.2d 237 (1940); *City Council of Augusta v. Cleveland*, 148 Ga. 734, 98 S.E. 345 (1919); *City of Gainesville v. Pritchett*, 129 Ga. App. 475, 199 S.E.2d 889 (1973).[11] These cases allow municipalities to be held liable in nuisance despite §69-301. While the cases do not explain why the municipalities are not immune, it is clear from several opinions that it is not because they fall within the exception for proprietary functions. Instead, this line of cases

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[10] *Accord Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975).

[11] *See also* Annot., 34 A.L.R.3d 1008, 1044-49 (1970).

must be read to be a common law exception to the general statutory rule expressed in §69-301 that municipalities are immune. Such an exception cannot be created for counties, because §23-1502 explicitly requires that exceptions to immunity be created by statute. In accord with this reading of *Town of Oglethorpe v. Phillips, supra*, is *Sheley v. Board of Public Education for City of Savannah and County of Chatham*, 132 Ga.App. 314, 317-18, 208 S.E.2d 126 (1974), *aff'd*, 233 Ga. 487, 212 S.E.2d 627 (1975), in which the Georgia Court of Appeals declined to apply the immunity exception of the *Ft. Oglethorpe* case to cases in which governmental subdivisions other than municipalities were sued in nuisance. See also, *Williams v. Ga. Power Co.*, 233 Ga. 517, 519, 212 S.E.2d 348 (1975). Accordingly, we hold that these cases do not create a cause of action in nuisance against counties.

III

[4] Finally, the plaintiffs seek to sue the county as third party beneficiaries to a contract between the Federal Aviation Administration (FAA) and DeKalb County. That contract provided for, among other things, the safe operation of the airport and surrounding properties controlled by the county. The district court rejected this claim, holding that counties are immune from suit for breach of contract. In support of that conclusion they cite *Purser v. Dodge County*, 188 Ga. 250, 3 S.E.2d 574 (1939). That case, however, never reached the question. "The question certified does not involve a determination as to whether a county would be liable on a contract which the law might expressly or impliedly authorize it to make." *Id.* at 253, 3 S.E.2d at 575. It is now a well settled proposition of Georgia

law that if a statute authorizes a county to contract, it also implicitly creates a cause of action for breach. Since the action against the county is authorized by statute, it is not barred by §23-1501. *Hancock County v. Williams*, 230 Ga. 723, 724, 198 S.E.2d 659 (1973); *Deason v. DeKalb County*, 222 Ga. 63, 65, 148 S.E.2d 414 (1966); *Decatur County v. Praytor, Howton and Wood Contracting Company*, 163 Ga. 929, 933-34, 137 S.E. 247 (1927); *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 865, 118 S.E.2d 234 (1960) (on motion for rehearing). Since it is clear that DeKalb County may be sued for breach of contract, the only remaining question is whether the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA.

[5] Actions on contracts by third party beneficiaries are explicitly provided for by Ga. Code Ann. §3-108. ". . . the beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract." The case law interpreting this statute has, however, limited its application to intended beneficiaries, as distinguished from incidental beneficiaries. Compare *Robinson Explosives, Inc. v. Dalon Contracting Co.*, 132 Ga.App. 849, 851-52, 209 S.E.2d 264 (1974), with *Stewart v. Gainesville Glass Co.*, 131 Ga.App. 747, 752-53, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 377 (1975). A typical situation under which a third party beneficiary cannot sue is presented by *Lee v. Petty*, 133 Ga.App. 201, 210 S.E.2d 383 (1974). In that case the plaintiffs attempted to sue Ware County under a contract between the county and a leasing company that required the county to obtain liability insurance. Merely because the plaintiffs would benefit from the existence of an insurance

policy was not sufficient. The court held that "[w]ithout question there was no contemplation that the appellants [would] be beneficiaries under the terms of the contract and hence there is no basis for their recovering under this case." *Id.* at 206, 210 S.E.2d at 386. Since the purpose of the insurance clause was not to protect the public, but to determine responsibilities and liabilities between the parties, injured members of the public could not sue.

[6] The remaining question, therefore, is whether the safety provisions in the contract between DeKalb County and the FAA were intended to benefit the public. The county argues that such a showing is not sufficient; not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach. Under Georgia law, however, it is well settled that a contract with a public body confers a benefit on the public if it is clear from the appropriate contractual provisions that the parties intended those provisions to benefit the public.

In *Smith v. Ledbetter Brothers, Inc.*, 111 Ga.App. 238, 141 S.E.2d 322 (1965), the defendant had entered into a road building contract with the state of Georgia. Included in that contract was an agreement that the defendant would "provide all safeguards, safety devices, and protective equipment and take any other needed actions, on his own responsibility or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the public . . ." *Id.* at 239, 141 S.E.2d at 324. The plaintiff in that case alleged that the defendant was negligent in carrying out his contractual obligation to provide for the safety of the public, and

that this negligence had resulted in the plaintiff's injury. The court held that the plaintiff could sue for this breach. "A contract between the State Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the work inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240, 141 S.E.2d at 324. Accord *M. R. Thomason and Associates, Inc. v. Wilson*, 125 Ga.App. 658, 661-62, 188 S.E.2d 805 (1972). The court did not discuss whether the parties contemplated creating a cause of action for the public. The mere creation of a contractual duty for the public's benefit necessarily created a cause of action in the public for its breach.

[7] The situation and contracts presently before the court are quite similar to those in the construction cases. DeKalb County's contract with the FAA provides that the county will operate the airport for the use and benefit of the public, will operate and maintain it in a safe and serviceable condition, and will limit use of adjacent land so that it will not interfere with the safe use of the airport.[12] The county breached this contractual duty, and as a result of that breach the plaintiffs were injured. We hold that these contractual provisions inured to the benefit of the public, and, accordingly, the plaintiffs may sue for breach.

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[12] *See* Project Application, Sponsor's Assurances, paragraphs 2, 6, 7, and 13 (appearing in the appendix of No. 74-3870, *Fireman's Fund Insurance Co. v. United States*, at 80-81). The Project Application is incorporated into the Grant Agreement by reference (appearing in Appendix, *supra*, at 62).

IV

[8, 9] Some of the plaintiffs also argue that the purchase of an insurance policy by the county creates a cause of action. Georgia law, however, has consistently held that the purchase of liability insurance by a county, even if the policy contains an explicit clause prohibiting the insurance company for pleading the immunity of the county, neither waives the immunity of the county from suit, nor creates a direct action against the insurer. *Arnold v. Walton*, 205 Ga. 606, 611-14, 54 S.E.2d 424 (1949); *Revels v. Tift County*, 235 Ga. 333, 335, 219 S.E.2d 445 (1975); *Lee v. Petty*, 133 Ga. App. 201, 205-06, 210 S.E.2d 383 (1975).

In conclusion, we hold that DeKalb County is susceptible to suit on theory of breach of contract and that all of the plaintiffs may sue as third party beneficiaries to the contract between DeKalb County and the FAA. All other actions are barred by the immunity of the county. Accordingly, we reverse.

DYER, Circuit Judge (dissenting):

Although I agree with the majority's conclusion that DeKalb County is immune from suit for negligence and nuisance, I disagree with their conclusion that the county can be held liable by plaintiffs as third-party beneficiaries of the Federal Grant Agreement between the United States and the county. At most, plaintiffs are incidental beneficiaries of that agreement, not entitled to recover for breach of contract.

At the outset, the majority errs by looking to Georgia law in determining whether plaintiffs are third-party

beneficiaries.[1] Although jurisdiction here is based upon diversity, the contract we are interpreting is one in which the United States is a party, and one which is entered into pursuant to authority conferred by federal statute. The necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation. *United States v. Seckinger*, 1970, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224; *Smith v. United States*, 5 Cir. 1974, 497 F.2d 500; *First National Bank v. Small Business Administration*, 5 Cir. 1970, 429 F.2d 280.[2]

Federal cases considering the question of when members of the public at large are third-party beneficiaries of a contract to which the United States is a party are few in number. However, those cases support the position of the Restatement of Contracts, §145, that such members of the public can recover damages under a contract with the United States to which they are not a party only when the contract manifests an intention

[1] Even if Georgia law should apply, the result would not be different. The majority recognizes that under Georgia law, only *intended*, and not *incidental* beneficiaries, may recover for breach of contract. As will be shown in this dissent, nothing in the grant agreements or the underlying statutes raises the status of the plaintiffs from incidental to intended beneficiaries.

[2] As stated in *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838:

> The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Even though we are here considering the liability of parties other than the United States, this same consideration controls, for if plaintiffs are third-party beneficiaries with respect to the obligations of the county under the contract, then they would also be third-party beneficiaries with respect to the obligations of the United States.

that they be so compensated.[3] *West v. Morrison-Knudsen Company*, 9 Cir. 1971, 451 F.2d 493 (Injured employee of subcontractor is not third-party beneficiary of safety provisions of prime contract between United States and general contractor); *Hensley v. United States*, D.Mont. 1968, 279 F.Supp. 548 (same); *Brotherton v. Merritt-Chapman & Scott Corp.*, 2 Cir. 1954, 213 F.2d 477 (provision in contracts requiring contractors to cooperate with one another was for benefit of government, and contractor could not recover from another as third-party beneficiary of that provision). *See also Johnson v. Redevelopment Agency*, 9 Cir. 1963, 317 F.2d 872; *Mahler v. United States*, 3 Cir. 1962, 306 F.2d 713; *Housing Corp. of America v. United States*, Ct. of Claims 1972, 468 F.2d 922, 199 Ct.Cl. 705; *Sayre v. United States*, N.D. Ohio 1967, 282 F.Supp. 175. It is not enough that the contract confer a benefit on the public at large.

Plaintiffs claim they are third-party beneficiaries of certain broad assurances made by the county and contained in the grant agreement, to the effect that the county will operate the airport safely and will control

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[3] Restatement of Contracts, §145, provides in pertinent part:

> A promisor bound to the United States or to a state or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences. . . .

surrounding airport hazards.[4] However, these contract assurances appear to be nothing more than the assurances required by 49 U.S.C.A. §1110.[5] I can find nothing in the language of the contract or the legislative history of 49 U.S.C.A. §1110 to indicate that the purpose of these assurances was to create a cause of action on behalf of injured third-parties. In fact, the only remedy provided in the grant agreement for breach of these assurances is termination of the grant by the United States. As in *United States v. Mahler, supra,* it appears that the only purpose of these assurances was to make sure that federal funds were effectively em-

[4] These assurances provide in pertinent part:

> The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes.
>
> In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, . . .
>
> Insofar as is within its power to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

[5] 49 U.S.C.A. §1110 provides in pertinent part:

> As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that
>
> * * * * *
>
> (2) such airport and all facilities thereon or connected therewith will be suitable operated and maintained, with due regard to climatic and flood conditions;
>
> (3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;
>
> * * * * *

ployed and not wasted.

Other courts, in considering third-party claims under the Federal Airport Act, 49 U.S.C.A. §1101 et seq., and the various agreements and assurances entered into pursuant to that act, have concluded that, although the act might incidentally benefit users of airports, both airlines and passengers, the primary purpose of the act was to establish a nationwide system of public airports adequate to meet the present and future needs of civil aviation. *Port of New York Authority v. Eastern Air Lines, Inc.*, E.D.N.Y. 1966, 259 F.Supp. 745; *San Francisco v. Western Air Lines, Inc.*, 1962, 204 Cal. App.2d 105, 22 Cal.Rptr. 216; *Eastern Air Lines v. Town of Islip*, 1962, Sup., 229 N.Y.S.2d 117. There is nothing to indicate an intent to compensate members of the public injured through the use of the airport.

The majority finds that "not only must the parties have intended to benefit the public, but they also must have intended to compensate members of the public who are injured as a result of a breach." I find no support for the second conclusion. It is based not on the language of the contract or the legislative history, but merely on a relatively few state cases which, as outlined above, are not controlling. I am unwilling to create a cause of action based on such a thin thread. I would therefore affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FIREMAN'S FUND INSURANCE COMPANY	CIVIL ACTION NO. C74-24A
vs.	
UNITED STATES OF AMERICA, DEKALB COUNTY, GEORGIA, et al.	

ORDER

This action was brought by Fireman's Fund Insurance Company against the United States of America, DeKalb County, Georgia, and the individual members of the Board of Commissioners of Roads and Revenues of DeKalb County (also referred to as DeKalb County) to recover for the distruction of a Lear Jet aircraft upon which it issued a policy of insurance. Jurisdiction exists as to this action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b)[1], and against DeKalb County and the Board

[1] 28 U.S.C. § 1346(b) provides in part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or admission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

of Commissioners as to this action pursuant to 28 U.S.C. §1332.[2] The case is now before the Court upon the United States's motion to consolidate this action with the case of *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), presently pending in this Court. Also before the Court is DeKalb County's motion to strike portions of the complaint and to dismiss the plaintiff's claims against it. Fed.R.Civ.P. 12(b) and 12(f).

The case arises out of a Lear Jet aircraft crash which occurred shortly after takeoff and approximately two miles southwest of the DeKalb-Peachtree Airport in DeKalb County, Georgia. A short time after the crash there were found the remains of several dead birds near the end of the runway from which the aircraft departed. Also discovered were numerous birds swarming over the airport and the adjacent garbage dump maintained by defendant DeKalb County. The complaint alleges that the turbine engines of said aircraft ingested a large number of these birds, resulting in the sudden loss of power in both engines and the crash and total destruction of said aircraft. Plaintiff claims that the United States, through its agency, The Federal Aviation Administration, and defendant DeKalb County, knew of the existing bird hazard at the DeKalb-Peachtree Airport, in that, such bird hazard had existed for a substantial period. It is urged that the existence of such birds at the county's garbage dump and airport created a substantial hazard to the safe operation of departing and arriving jet turbine aircraft. Based upon these

[2] 28 U.S.C. § 1332 provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds $10,000 . . . and is between—(1) citizens of different states. . . ."

allegations, the plaintiff claims that both the United States and DeKalb County were negligent in the operation and maintenance of the airport. It is further alleged that DeKalb County is liable for the maintenance of a public nuisance and for breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public.

I. MOTION TO CONSOLIDATE

The defendant United States has moved the Court pursuant to Fed.R.Civ.P. 42(a)[3] to consolidate the instant action with *Miree v. United States*, Civ.No. 19293 (N.D. Ga., filed Nov. 5, 1973), for purposes of discovery and trial on the issue of liability. Both of these cases involve the open garbage dump at the airport, the operation of the airport, certain formal agreements between the United States and DeKalb County concerning the operation of the airport, the bird hazard, and the crash of the Lear Jet on February 26, 1973. The plaintiff makes no objection to the motion to consolidate.[4]

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[3] Fed.R.Civ.P. 42(a) provides:

> "When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[4] There is now pending in this Court five additional cases related to the Lear Jet crash near DeKalb-Peachtree Airport on February 26, 1973: (1) *United States of America v. A. C. Guhl*, Civ. No. 17968 (N.D. Ga., filed 1973), which involves an attempt by the United States to prohibit DeKalb County from continuing to maintain a hazard near an airport in the form of a garbage dump; (2) *Miree v. United States of America*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973) which involves wrongful death claims filed by the children of two passengers aboard the aircraft; (3) *Phillips v.*

Based upon a full consideration of both cases, the Court concludes that it will follow its regular procedure of deferring decision on consolidation for trial purposes until the pretrial conference of this case. In this manner, the Court can more fully grasp the effect of such a ruling and whether it will best serve the convenience of the parties and the Court by eliminating unnecessary repetition. Such a procedure also insures that the rights of the parties will not be prejudiced by a premature order of consolidation. *See generally Dupont v. Southern Pacific Co.*, 366 F.2d 193 (5th Cir. 1967), *cert. den.* 386 U.S. 958 (1967). The Court does believe though, that since there are common questions of law and fact involving liability in both cases, and no objection appearing, consolidation will be ordered for purposes of discovery and other pretrial matters.

II. MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS

DeKalb County and the individual defendants have moved to dismiss this action as to them for lack of jurisdiction over their person. The County and the Commissioners claimed that they were not personally served as required by law. *See* Fed.R.Civ.P. 12(b)5. Thereafter plaintiff caused the United States Marshal to serve the complaint and summons personally upon the defendants. The DeKalb County defendants then filed a response (March 12, 1974) to the renewed ser-

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United States of America, Civ. No. 19412 (N.D. Ga., filed Nov. 28, 1973), which involves a wrongful death action by the wife of the co-pilot aboard the aircraft; (4) *William Michael Fields v. United States of America, et al.*, Civ. No. C74-291A (N.D. Ga., Feb. 20, 1974), which involves a person entering his automobile and burned by the crash of the Lear Jet; (5) *Chaisson v. Southeast Machinery, Inc.*, Civ. No. 74-915A (N.D. Ga., filed May 10, 1974), which involves damage to the property where the Lear Jet crashed.

vices wherein they admitted that they had been "served as by law provided." Accordingly, the Court finds that the motion to dismiss for insufficient service of process has been rendered moot and is hereby denied.

III. MOTION TO STRIKE

Defendant DeKalb County has moved to strike various paragraphs of plaintiff's complaint for failing to state a claim either in negligence, nuisance, or breach of contract. The Court particularly notes that defendants' motion to strike is based upon the ground that portions of plaintiff's complaint fail to state a claim upon which relief may be granted. Such a ground for a motion to strike is clearly inappropriate under Fed.R.Civ.P. 12(f).[5] The purpose of rule 12(f) is to simplify and limit the pleadings by an elimination of any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The defendant fails to enumerate these grounds in its motion.[6] The substantive arguments made by defendant are more appropriately made in a motion to dismiss under rule 12(b)6 and will be treated as such. Accordingly, the request to strike is denied.

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[5] See 5 Wright and Miller, Federal Practice and Procedure. § 1380 at 782 (1969) where it is stated: "[Rule 12(f)] is neither an authorized nor a proper way to procure the dismissal of all or part of a complaint. . . ."

[6] DeKalb County's argument, in support of its motion, that paragraphs 65(a) and 65(b) relating to DeKalb County's insurer is without merit. No prejudicial effect appears from a mere allegation of insurance coverage inasmuch as it is not the practice of this court to allow the jury to see the pleadings.

IV. MOTION TO DISMISS

The plaintiff's complaint, as it pertains to DeKalb County, bases an alleged right of recovery on the theories of nuisance, negligence, and breach of contract. To these claims DeKalb County has filed a motion to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)6. Although various arguments are raised by the parties, the Court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity as it exists in Georgia. This issue will be discussed in the context of plaintiff's claims.

A. Nuisance

Plaintiff contends that defendants are guilty of the maintenance of a public nuisance—a garbage dump adjacent to and contiguous with the airport; that defendants knew and realized for a significant period of time that said nuisance constituted a hazard to aircraft landing and departing from the airport and; that as a result of said nuisance special damage has been sustained by plaintiff. In response to these contentions the defendant urges that Ga. Code §23-1502 bars any action against a county for maintenance of a nuisance.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." With this statutory basis the Georgia courts have required the party filing suit to show the appropriate statutory authority allowing a claim. As stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority

> can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. *See also Seymore v. Elbert County*, 116 Ga. 371 (1902); *Anderson v. DeKalb County*, 107 Ga.App. 328 (1963); *Ayers v. Franklin County*, 73 Ga.App. 207 (1945). This view was recently reaffirmed in the revised opinion of *Sheley v. Board of Public Education For The City of Savannah and the County of Chatham*, No. 49044 (Ga. Ct. of App., 1974), decided by the Georgia Court of Appeals. In *Sheley* the plaintiff brought suit against the Board of Education for Chatham County to recover for her child's death, allegedly caused by falling into an open septic tank located on school property. In ruling upon a motion to dismiss, the Court, in its revised opinion, refused to allow a nuisance or negligence claim against governmental subdivisions other than municipalities. This holding appears to be in accordance with the rulings of the Georgia Supreme Court. *cf. Crowder v. Department of State Parks*, 228 Ga. 436 (1971).

Plaintiff's reliance upon *Nalley v. Carroll County*, 135 Ga. 835 (1911) and *DeKalb County v. McFarland*, 223 Ga. 196 (1967), appears to be misplaced. Both cases fall within the Constitutional provision holding a county liable for damages to private property taken for public uses. *See* Ga. Code §2-301. These suits are expressly authorized and fall within the statutory exception provided for in Ga. Code §23-1502, *See Purser v. Dodge County*, 188 Ga. 250 (1939), and are not applicable to the present case.

B. Breach of Contract

Plaintiff, in its complaint, contends that DeKalb County executed six Federal Grant Agreements with the United States. Pursuant to the terms of these agreements DeKalb County obligated itself to perform certain duties with regard to the use and maintenance of the airport, as well as the land adjacent thereto. Plaintiff further averred that DeKalb County violated this agreement by permitting a garbage dump to be maintained in the vicinity of the airport. As a consequence of the breach of this contract, plaintiff was obligated to indemnify its insured for the loss of the aircraft. Based upon these allegations, plaintiff claims it, as assignee of the insured's rights, is a third-party beneficiary to the Grant Agreement and that it may maintain an action against DeKalb County for breach of contract.

Although the party's briefs discuss the question of the intent of each party to create third-party beneficiary rights, the Court conceives the issue to be much narrower *i.e.* whether sovereign immunity acts as a bar to suit against the county for breach of its contract with the Federal Government. This question appears to have been answered in *Purser v. Dodge County*, 188 Ga. 251 (1939). In *Purser* a question was certified to the Georgia Supreme Court on whether a county was liable in damages to a highway traveler caused by the negligence of the county in performing its contract with the State Highway Department for paving of a highway. *Id.* at 251. The Court after discussing the effect of the doctrine of governmental immunity on suits against counties concluded:

> [T]here is no constitutional or statutory provision which can be taken to render a county liable for a

> tort on account of personal injuries arising from a defect in a highway constructed or maintained by the county; and this is true irrespective of whether the construction or repairs of the highway was done in the performance of the county's own governmental functions in maintaining its system of highways, *or whether it was done, as stated in the certified question, under a contract made by the county with the State Highway Department solely for pecuniary gain.* (emphasis added).

Id. at 252.

Inasmuch as this Court must follow the law of Georgia in this diversity suit, the Court finds that any claim by plaintiff for damages resulting from the breach of the contract between DeKalb County and the United States is barred by governmental immunity. By so holding, it is unnecessary for the Court to reach the question of whether plaintiff can recover as a third-party beneficiary under the contract in question.

C. **Negligence**

The plaintiff's remaining claim against DeKalb County is based upon negligence in the operation and maintenance of the DeKalb-Peachtree Airport. As previously discussed with regard to the nuisance allegation, the doctrine of governmental immunity bars this claim. Nevertheless, plaintiff, relying upon *Caroway v. City of Atlanta*, 85 Ga.App. 792 (1952), and *Taylor v. King*, 104 Ga.App. 589 (1961), urges that a county can be held accountable for negligence when acting in a ministerial or proprietary function. Both *Caroway* and *Taylor* involved municipalities which have distinctive liabilities in Georgia not applicable to counties. In *Troup County Electric Membership Corp. v. Georgia*

Power Co., 229 Ga. 348 (1972), this distinction was explained.

> 'Counties are subdivisions of the State Government to which the state parcels its duty of governing the people (citations omitted). They are local, legal, political subdivisions of the State . . . administrating locally the general powers and policies of the State . . . .' On the other hand, municipalities are creatures of the Legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature. *Id.* 352.

See also Purser v. Dodge County, 188 Ga. 250 (1939); *Sheley v. Board of Public Education For The City of Savannah and The County of Chatham*, No. 49044 (Ga. Ct. of App., 1974); *Ware County v. Carson*, 189 Ga. 78 (1939). The Georgia courts have consistently held that the county is an "arm of the state." As such it carries the state's burdens and responsibilities within its respective locality. On the other hand, a municipality, as a legislative creation, can select its available powers, rejecting those liabilities inapplicable to its particular purpose. It is upon this basis that the differing liabilities are based. While it must be conceded that DeKalb County has, by operating an airport, extended its activities into areas beyond its traditional function, this Court is unable to find that the distinctive classification is unrelated to the purpose of Ga. Code §23-1502 to justify holding DeKalb County liable.

D. **Waiver of Governmental Immunity**

The plaintiff alleges that DeKalb County has purchased liability insurance with respect to property damage claims such as the one presented here. Also

shown is that DeKalb County required that the policy contain a "waiver of governmental immunity clause." In this regard the policy provided:

> It is agreed that the company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the state performing governmental function[s].

The plaintiff claims that this affirmative action by DeKalb County constitutes an express or implied waiver of sovereign immunity with respect to property damage claims arising out of the negligent operation of the airport, at least to the extent of the limits of liability. The question as to what extent an otherwise existing governmental immunity is affected by the procurement of insurance was discussed in *Winston v. City of Austell*, 123 Ga.App. 183 (1971). In *Winston* the plaintiff sought damages for the city's alleged negligence and maintenance of a nuisance in the operation of a jail. It was alleged that the city had procured liability insurance which by its terms covered the claim. In response to this allegation the Court found:

> [T]he procurement of liability insurance by the city does not constitute a waiver of the defense of sovereign immunity insofar as this defense bars recovery for damages caused by the performance of a governmental function in a negligent manner.

Id. at 184. This appears to be in accord with the majority view in other jurisdictions. *cf.* Annot., 68 A.L.R. 2d 1438 (1959).

Likewise, in *Ware County v. Carson*, 61 Ga.App. 15 (1939), the plaintiff who was injured while a patient in

a county hospital sought to recover for her injuries. The county had procured a policy of insurance indemnifying it against loss. The Court on a motion to dismiss found that in circumstances where the county is not subject to suit for the injuries complained of, the Court is not authorized to fix the liability of the insurer in a case where the insurer is not a party.

The Court finds both *Winston* and *Ware County* persuasive as to the course it should take in the pending matter. It is for the Georgia legislature to prescribe whether, and under what conditions, one may maintain an action against a county for injury, and the legislature's power in this respect is controlling. Accordingly, the Court is compelled to find that the fact that DeKalb County has obtained a policy of liability insurance does not in itself result in a waiver of governmental immunity.

The Court further finds that the express policy provision waiving immunity does not change this result. By its terms, the contract is one between the assured and the insurance company. There is nothing in the above-quoted provision which was intended to confer a benefit upon the public generally; but rather, was to protect the county against such a defense once a judgment was entered against it.

V. PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM OF THE DEFENDANT UNITED STATES

Defendant United States has filed a counterclaim against the plaintiff alleging that the negligence of plaintiff's insured is imputed to it. Plaintiff has moved to dismiss this allegation for failure to state a claim for relief. Fed.R.Civ.P. 12(b)(6).

The pleadings in this case establish that Fireman's Fund Insurance Company was not responsible for the ownership or operation of the aircraft, nor was it responsible for the crash in question. Nothing is alleged by the United States which could show liability based on respondent superior or any other form of liability with respect to the airplane crash. Fireman's Fund, having paid the insured, is a mere subrogee or assignee of the insured's rights. These facts fail to establish any claim against the plaintiff. Accordingly, plaintiff's motion to dismiss the counterclaim of the United States is granted.

In summary, the Court (1) grants the United States's motion to consolidate this case with *Miree v. United States*, Civ. No. 19293 (N.D. Ga., filed Nov. 5, 1973), for discovery purposes but defers ruling on consolidation for trial purposes until the pretrial hearing of this case, (2) denies DeKalb County's motion to strike portions of plaintiff's complaint, and (3) grants DeKalb County's motion to dismiss plaintiff's complaint as to its claims of negligence, nuisance and for breach of contract, (4) grants the plaintiff's motion to dismiss the counterclaim of defendant United States.

IT IS SO ORDERED this 27th day of June, 1974.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FIREMAN'S FUND INSURANCE COMPANY

vs.

UNITED STATES OF AMERICA

CIVIL ACTION NO. C74-24A

Filed Sept. 25, 1974

ORDER DENYING MOTION TO SET ASIDE PRIOR ORDER DISMISSING DEKALB COUNTY

This action was brought by Fireman's Fund Insurance Company against the United States of America, DeKalb County, Georgia, and the individual members of the Board of Commissioners of Roads and Revenues of DeKalb County (also referred to as DeKalb County) to recover for the destruction of a Lear jet aircraft upon which it issued a policy of insurance. In a prior order of this court, *Fireman's Fund Insurance Co. v. United States*, Civ. No. C74-24A (N.D. Ga., June 27, 1974), DeKalb County was dismissed as a party defendant for plaintiff's failure to state a claim. Fed.R.Civ.P. 12(b)(6). This court rested its decision upon DeKalb County's governmental immunity from suit. The case is now before the court on plaintiff's motion for reconsideration of this ruling.

Briefly stated, the case arises out of an aircraft crash which occurred shortly after takeoff from the DeKalb-Peachtree Airport in DeKalb County, Georgia. All persons aboard the aircraft were killed. The complaint alleges that numerous birds swarmed over the airport and adjacent garbage dump maintained by

DeKalb County, and that the turbine engines of the aircraft ingested a large number of these birds resulting in the sudden loss of power in both engines and the crash of such aircraft. Based upon these allegations, plaintiff claimed that both the United States and DeKalb County were negligent in the maintenance of a garbage dump near the airport and that piaintiff as a third-party beneficiary may recover for DeKalb County's breach of a contract with the United States in failing to adequately maintain the airport for the benefit of the public. To these claims DeKalb County filed a motion to dismiss, which this court granted. Although various arguments were raised by the parties, the court determines the basic issue to be whether plaintiff's claims are maintainable against DeKalb County in light of the doctrine of governmental immunity.

Pursuant to statutory authority, counties in Georgia enjoy the cloak of governmental immunity. *See Seymore v. Elbert County*, 116 Ga. 371 (1902). Ga. Code §23-1502 provides that "[a] county is not liable to suit for any cause of action unless made so by statute." Consistent with this statute, the Georgia courts have required parties filing suit against a county to show the appropriate statutory authority allowing a claim. As was stated in *Millwood v. DeKalb County*, 106 Ga. 743 (1899):

> The county, being a political division of the state is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies to bring suit.

Id. at 747. Notwithstanding this interpretation, the plaintiff, relying upon *Caroway v. City of Atlanta*, 85

Ga.App. 792 (1952), *Taylor v. King*, 104 Ga.App. 589 (1961), and *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850 (1960), urges this court to adopt the view that a county can be held accountable when acting in a proprietary capacity such as DeKalb County's operation of the DeKalb-Peachtree Airport. Although the court sympathizes with plantiff's view, it cannot so read the cited cases. Both *Caroway* and *Taylor* involved suits against municipalities which have distinctive liabilities not applicable to counties. *Ware County v. Cason*, 189 Ga. 78 (1939). This distinctive liability is set forth in Ga. Code §69-301 which provides that municipalities shall be liable for "improper or unskillful performance of their ministerial duties. . . ." *See generally Troup County Electric Membership Corp. v. Georgia Power Co.*, 229 Ga. 348 (1972). Neither the statutes or Georgia courts have made such a distinction between governmental and proprietary functions with respect to a county's liability under facts such as are presented here. As was clearly stated in *Ware County v. Cason*, 189 Ga. 78, 79 (1939):

> There is a statute which, on the basis of distinction between governmental functions of municipal corporations and ministerial acts, inhibits municipal liability for damages flowing from breach of duty in regard to the former, and imposes municipal liability for breach of duty in regard to the latter. (citations omitted). But there is no such statute relating to counties and no statute making a county liable to suit for tort based on negligence in operating a hospital. . . .

Plaintiff further argues that in *Southern Airways* the Georgia court is moving away from the traditional doctrine of governmental immunity. The court cannot agree. *c.f. Crowder v. Department of State Parks*, 228

Ga. 436 (1971); *see Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.of App. 1974). Although there is some language in *Southern Airways* which supports plaintiff's position, the case involved merely a declaration of rights of the parties under a lease agreement. This is a reiteration of the rule set out in *Decatur County v. Prayton, Howton & Wood Contracting Co.*, 163 Ga. 929 (1927), that

> [w]henever a county . . . is authorized by statute to contract, and in pursuance of such power does contract, then an action will lie against it to enforce such liability . . . although there is no statute authorizing the bringing of an action for such purpose.

Id. at 934.

This court also finds that plaintiff's reliance upon *DeKalb County v. McFarland*, 223 Ga. 196 (1967), is misplaced. *McFarland* fell within the Georgia constitutional provision holding a county liable for damage to private property taken for public uses, *see* Ga. Code §2-301; *Smith v. Floyd County*, 85 Ga. 420 (1890), and is distinguishable. Accordingly, the court reaffirms its prior holding that plaintiff's claim of damages resulting from the alleged nuisance fails to set forth a claim against DeKalb County. *State Highway Department v. Barrett*, 124 Ga.App. 703 (1971); *Crowder v. Department of State Parks*, 228 Ga. 436 (1971); *Sheley v. Board of Public Education for the City of Savannah and the County of Chatham*, No. 49044 (Ga.Ct.of App. 1974).

For the foregoing reasons, the plaintiff's motion to set aside the prior order dismissing DeKalb County having been considered, it is hereby DENIED.

Inasmuch as the question of DeKalb County's liability to suit involves a controlling question of law upon which the respective liabilities of the parties rest, and there appear to be substantial grounds for differing opinions, an immediate appeal from this order will materially advance the ultimate determination of the litigation. For this reason the court sees no just reason for delay and directs the Clerk to enter final judgment dismissing DeKalb County from this case.

IT IS SO ORDERED this 24th day of September, 1974.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge

* * *

FINAL JUDGMENT PURSUANT TO RULE 54(b)

(Number and title omitted)

(Filed Sept. 25, 1974)

An Order having been signed by Judge William C. O'Kelley on June 27, 1974 and filed in the Clerk's Office on June 27, 1974 granting the motion of Defendant DeKalb County to dismiss the complaint for failure of plaintiff to state a claim, further, the motion by plaintiff Fireman's Fund Insurance Company to set aside prior order dismissing DeKalb County and the members and chairman of the Board of Commissioners of Roads and Revenues of DeKalb County filed on July 3, 1974, having been denied by Order of the Court dated filed on September 25, 1974, the Court having directed entry of final judgment pursuant to Rule 54(b)

of the Federal Rules of Civil Procedure, and thus having certified that there is no just reason for delay, and expressly directing entry of final judgment on said complaint against the plaintiff, it is

ADJUDGED that the action be dismissed as to the Defendants, DEKALB COUNTY, A. C. GUHL, WILLIAM A. WILLIAMS, T. M. CALLAWAY, JR., HOKE CLAYTON SMITH, ROBERT J. MORRIS, HORIS A. WARD, W. M. COLLIDGE, and H. F. MANGET, that the plaintiff, FIREMAN'S FUND INSURANCE COMPANY, take nothing and that the taxation of costs in the action shall await entry of final judgment as to all defendants.

This 25th day of September, 1974.

BEN H. CARTER, Clerk

BY: /s/ DANNY BROWN
DANNY BROWN
Deputy Clerk
U. S. District Court
Northern District of Georgia

Approved and Ordered
filed of record:

S/ W. C. O.
United States District Judge

* * *

AMENDMENT OF FINAL JUDGMENT

(Number and Title Omitted)

(Filed Oct. 2, 1974)

In order to correct a clerical error, and pursuant to Rule 60(a), Fed. R. Civ. P., the final judgment dated and filed on September 25, 1974 in this case is hereby amended by deleting H. F. Manget from the judgment of dismissal, so that as the case now stands H. F. Manget remains as a party defendant.

It is so ordered and adjudged.

This 2nd day of October, 1974.

/s/ WILLIAM C. O'KELLEY

Judge, United States District Judge

* * *

APPENDIX D

United States Court of Appeals

For the Fifth Circuit

October Term, 1975

NO. 74-3870

D. C. Docket No. CA C-74-24-A

FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee,

DEKALB COUNTY, GEORGIA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

*Because of illness Judge Wisdom did not participate in the hearing or in the consideration of this case Judge Thornberry was a member of the En Banc court that heard oral arguments but due to illness did not participate in this decision.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on the petition of defendant-appellee, DeKalb County, Georgia, for rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed by the Court en banc;

It is further ordered that plaintiff-appellant pay to defendant-appellee, DeKalb County, Georgia, the costs on appeal to be taxed by the Clerk of this Court.

August 25, 1976

TJOFLAT, Circuit Judge, concurring;

MORGAN, Circuit Judge, with whom BROWN, Chief Judge, and GOLDBERG, AINSWORTH and GODBOLD, Circuit Judges, join dissenting;

BROWN, Chief Judge, dissenting.

Issued as Mandate: Sept. 16, 1976

Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-700

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

BRIEF OF PETITIONER ON THE MERITS

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March 2, 1977

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	19
ARGUMENT AND CITATION OF AUTHORITIES	21
I. The Decision Below Is Erroneous And In Irreconcilable Conflict With Both Federal Common Law And Relevant State Law	21
A. As an aeronautical user of the Airport, petitioner's insured was an intended and direct beneficiary of the duties and obligations imposed on DeKalb County	22
B. The decision below conflicts with Federal Common Law	25
C. The decision below Conflicts with relevant State Law	33
II. The Paramount And Overriding Interest Of The Federal Government In Regulating All Phases of Aeronautical Commerce Preempts At Least To A Limited Degree Local Laws Concerning Sovereign Immunity	37
III. The Decision Below Has Resulted In An Unconstitutional Denial Of Equal Protection And Due Process	43
CONCLUSION	47
CERTIFICATE OF SERVICE	48

TABLE OF CONTENTS—Continued

Page

EXHIBITS:

Exhibit A—Statutes Involved 1a

Exhibit B—Log of Bird Sightings or Bird Counts Made By F.A.A. Tower Controllers At The Airport 1b

Exhibit C—Written Notice Of Prior Airplane-Bird Strikes At The Airport 1c

Exhibit D—Letters To and From The F.A.A. and DeKalb County Concerning The Bird Hazard And Garbage Dump 1d

Exhibit E—Series of Court Orders Entered In Suit Filed By F.A.A. Against DeKalb County Fourteen Days After The Crash In Question, Seeking Enforcement Of The Grant Agreements And Alleviation Of The Bird Hazard 1e

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. City of Audubon Park, Kentucky, 297 F.Supp. 207 (W.D.Ky. 1968) *aff'd* 407 F.2d 1306 (6th Cir. 1969) 37

American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968) 37

Arney v. United States, 479 F.2d 653 (9th Cir. 1973) .. 30

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 32

Bank of America National Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956) 34

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Barlow v. Collins, 397 U.S. 159 (1970) 32

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 41, 42

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967) 30

Briggs v. Sagers, 424 F.2d 130 (10th Cir.) *cert. denied* 400 U.S. 829 (1970) 39

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 44

Brown v. Merlo, 506 P.2d 212 (Cal. 1973) 46

Brown v. Wichita State University, 547 P.2d 1015 (Kan. 1976) *appeal dismissed*, ____ U.S. ____, 97 Sup.Ct. 41 (1976) 46

Caroway v. City of Atlanta, 85 Ga.App. 792, 70 S.E.2d 126 (1952) 43

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968) 39

City and County of San Francisco v. Western Air Lines, Inc. 204 Cal.App.2d 105, 22 Cal.Rptr. 216 (1962) 29

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 37

City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972) 26, 32

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 25

Cort v. Ash, 422 U.S. 66 (1975) 32, 33, 40

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Deason v. DeKalb County, 222 Ga. 63, 148 S.E.2d 414 (1966) 35

DeKalb Real Estate Board, Inc. v. DeKalb County, 372 F.Supp. 748 (N.D.Ga. 1973) 44

DeSylva v. Ballentine, 351 U.S. 570 (1956) 34

Eastern Air Lines, Inc. v. Town of Islip, 229 N.Y.S.2d 117 (N.Y.Sup.Ct. 1962) 29

Eisenstadt v. Baird, 405 U.S. 438 (1972) 44

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 3, 34

First National Bank, Henrietta, v. Small Business Administration, 429 F.2d 280 (5th Cir. 1970) 25

Gabel v. Hughes Air Corp., 350 F.Supp. 612 (C.D.Cal. 1972) 25, 42

Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968) 45

Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969) 42

Hancock County v. Williams, 230 Ga. 723, 198 S.E.2d 659 (1973) 36

Hebah v. United States, 428 F.2d 1334 (Ct.Cl. 1970) 30

Henry v. Bauder, 518 P.2d 362 (Kan. 1974) 46

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 25, 26

Holland v. Phillips, 94 Ga.App. 361, 94 S.E.2d 503 (1956) 34

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Humphreys v. Tann, 13 CCH Avi. 18, 229 (E.D. Mich. 1976) 26

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 41

In Re Paris Air Crash, 399 F.Supp. 732 (C.D.Cal. 1975) 42

Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1975) 46

Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974) *cert. denied* 421 U.S. 987 (1975) 26

Laakonen v. Eighth Judicial District Court, 538 P.2d 574 (Nev. 1975) 46

Levy v. Louisiana, 391 U.S. 68 (1968) 45

Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975) 28

M. R. Thomason & Associates v. Wilson, 125 Ga.App. 658, 188 S.E.2d 805 (1972) 34

Maryland v. Wirtz, 392 U.S. 183 (1968) 38

McGowan v. Maryland, 366 U.S. 420 (1961) 44

Morey v. Doud, 354 U.S. 457 (1958) 44

Moyer v. Phillips, 341 A.2d 441 (Pa. 1975) 46

Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C.Cir. 1975), *rev'd on other grounds* ____ U.S. ____, 96 Sup.Ct. 1978 (1976) 42

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 37

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TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3rd Cir. 1971) 39

Port of New York Authority v. Eastern Air Lines, Inc., 259 F.Supp. 745 (E.D.N.Y. 1966) 28, 29

Primes v. Tyler, 331 N.E.2d 723 (Ohio 1975) 46

Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D.Pa. 1967) 13, 28

Rauch v. United Instruments, Inc., 45 U.S. L. Week 2333 (3rd Cir. 1976) 29, 41, 42

Reed v. Reed, 404 U.S. 71 (1971) 44

Royster Guano v. Virginia, 253 U.S. 412 (1920) 44

Seaboard Air Line R.R. v. Crisp County, Georgia, 280 F.2d 873 (5th Cir. 1960) *cert. denied*, 375 U.S. 942 (1961) 31, 36

Sheppard v. Bridges, 137 Ga. 615, 74 S.E.2d 245 (1912) 34

Smith v. Ledbetter Brothers, Inc., 111 Ga.App. 238, 141 S.E.2d 322 (1965) 34

Smith v. United States, 497 F.2d 500 (5th Cir. 1974) .. 25

Southern Airways Co. v. DeKalb County, 102 Ga.App. 850, 118 S.E.2d 234 (1960) 35, 43

State Construction Company v. Johnson, 88 Ga.App. 651, 77 S.E.2d 240 (1953) 34

Town of East Haven v. Eastern Air Lines, Inc., 282 F.Supp. 507 (D. Conn. 1968) 42

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TABLE OF AUTHORITIES—Continued

Page

Cases—Continued:

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United States v. Seckinger, 397 U.S. 203 (1970)..... 25

United States v. Yazell, 382 U.S. 341 (1966)..... 34

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966)..... 34

Ward v. Hudnell, 366 F.2d 247 (5th Cir. 1966)..... 18

Wilder v. State, 232 Ga. 404, 207 S.E.2d 38 (1974).... 44

Williamson v. Fortson, 376 F.Supp. 1300 (N.D.Ga. 1974)..... 45

Yick Wo v. Hopkins, 118 U.S. 356 (1886)..... 44

Constitutional Provisions:

Fourteenth Amendment, United States Constitution.. 3

Article XI, Paragraph I of the 1945 Georgia Constitution..... 2

Statutes:

28 U.S.C. § 1254..... 2

28 U.S.C. § 1331..... 41

28 U.S.C. § 1652..... 2

49 U.S.C. § 1701.....2, 4, 5

49 U.S.C. § 1711.....2, 17

49 U.S.C. § 1713..... 2

49 U.S.C. § 1714..... 2

49 U.S.C. § 1716.....2, 22, 26, 27

49 U.S.C. § 1718.....2, 17, 22, 26, 27

TABLE OF AUTHORITIES—Continued

Page

Statutes—Continued:

Ga. Code § 3-108 2,34
Ga. Code § 11-201 2,43
Ga. Code § 11-205 2
Ga. Code § 11-402 2
Ga. Code § 11-403 2
Ga. Code § 23-1501 3,35
Ga. Code § 23-1502 3,5,21,35,43,47
Ga. Code § 69-301 3,43

Administrative Rules and Regulations:

14 CFR § 151.5(b)(1) 23
14 CFR § 152.5(b) 23

Legislative Materials:

H.R. Rep. No. 91-601, 91st Cong., 2nd Sess. (1970) .. 24

Treatises:

4 Corbin on Contracts, Sec. 776 33
4 Corbin on Contracts, Sec. 777 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-700

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

BRIEF OF PETITIONER ON THE MERITS

Petitioner Fireman's Fund Insurance Company respectfully submits this brief on the merits in response to the January 17, 1977 Order granting petitioner's request for a writ of certiorari and consolidating this case with Case Nos. 76-607, 76-659 and 76-722.

OPINIONS BELOW

The en banc opinion of the Fifth Circuit Court of Appeals, entered after rehearing, is reported at 538 F.2d 643 and is reprinted at P.A. 1a-6a.[1] The original panel decision of the Fifth Circuit Court of Appeals, and the order granting rehearing en banc, are reported at 526 F.2d

[1] As used herein, "P.A. ____" refers to pages of the Appendix attached to Petitioner's November 19, 1976 Petition for Writ of Certiorari, and "J.A. ____" refers to pages of the separate Joint Appendix filed in all four of the consolidated cases.

679 and are reprinted at P.A. 17a-34a. The opinions of the District Court are not reported, but are reprinted at P.A. 35a-54a.

JURISDICTION

The original panel decision of the Fifth Circuit Court of Appeals was entered on January 30, 1976 and respondent DeKalb County's timely petition for rehearing en banc was granted on April 5, 1976. (P.A. 17a-34a.) The en banc decision of the Fifth Circuit Court of Appeals was entered on August 25, 1976. (P.A. 1a-16a.) The judgment on rehearing en banc of the Fifth Circuit Court of Appeals was entered on August 25, 1976 and is reprinted at P.A. 55a-56a. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes and laws involved in this case were set forth verbatim on pages 5-11 of petitioner's petition for writ of certiorari. Because such provisions are lengthy they are not set out in the body of this brief. For convenient reference, however, the involved statutes and laws are set forth in Exhibit A to this brief, at the pages specified below:

Rules of Decision Act, 28 U.S.C. § 1652..... 1a

Airport and Airway Development Act, 49 U.S.C. §§ 1701, 1711, 1713, 1714, 1716, and 1718..... 1a

Georgia Uniform Airports Law, Georgia Code Sections 11-201, 11-205, 11-402 and 11-403..... 4a

Georgia Code Section 3-108..... 6a

Article XI, Paragraph I of the 1945 Georgia Constitution..... 7a

Georgia Code Section 23-1501 ..... 7a
Georgia Code Section 23-1502 ..... 7a
Georgia Code Section 69-301 ..... 7a
Fourteenth Amendment, United States Constitution 7a

QUESTIONS PRESENTED

1. Must a Federal Court in a diversity of citizenship case ordinarily subject to the holding of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), be governed by federal common law in determining whether private litigants have standing as third-party beneficiaries to sue a county for breach of safety covenants contained in Grant Agreements entered into between the F.A.A. and the county for improvement of the county airport, which safety covenants ex facie are intended for the safety and benefit of aeronautical users of the county airport, and, if federal common law does apply to such issue, should not the Federal Court in deciding such issue follow the federal common law rulings of other Federal Courts (including Circuit Courts of Appeals) on the question?

2. If a Federal Court in a diversity of citizenship case should not apply federal common law in determining whether private litigants have standing as third-party beneficiaries to sue a county for breach of safety covenants contained in Grant Agreements entered into between the F.A.A. and the county for improvement of the county airport, which safety covenants ex facie are intended for the safety and benefit of aeronautical users of the county airport, does not the holding of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), require the Federal Court to follow and apply the substantive law clearly and on several

occasions announced by the highest appellate courts of the forum state with respect to the question at issue, rather than the Federal Court's concept of the law prevailing in other jurisdictions, particularly when the substantive law of the forum state would have the effect of enforcing the objectives of such safety covenants and fostering the public policy inherent in such safety covenants and in federal legislation concerning aviation and aid to airports?

3. Is there an overriding federal interest in the regulation of aeronautical interstate commerce that preempts at least to a limited degree state laws concerning local sovereign immunity, so that a county which has entered into Grant Agreements with the F.A.A. under the aegis of the Airport and Airway Development Act (49 U.S.C. §§ 1701, *et seq.*) and has received significant federal funding of county airport improvements, is precluded from asserting sovereign immunity as a bar to suits brought by aeronautical users of the county airport, as third-party beneficiaries, for negligent breach by the county of safety covenants contained in the Grant Agreements, when such safety covenants ex facie are intended for the benefit of aeronautical users of the airport, and particularly when the denial of sovereign immunity to the county under such circumstances would have the effect of enforcing the objectives of such safety covenants and fostering the public policy inherent in the federal regulation of aviation and would also result in nationwide uniform interpretations of federal aviation legislation?

4. As both municipalities and counties in Georgia have the identical authority to engage in the same proprietary function of owning and operating public airports, and as both municipalities and counties are eligible on an equal

basis for Grant Agreements and federal funds under the Airport and Airway Development Act (49 U.S.C. §§ 1701, *et seq.*), and as under Georgia law a governmental entity in the form of a municipality has no sovereign immunity from suits arising from municipal ownership and operation of public airports, and as there are no rational or legitimate distinctions and differences between the proprietary function of a municipality in owning and operating a public airport and the proprietary function of a county in owning and operating a public airport, do the decisions below, which provide a county with absolute sovereign immunity, serve to create an irrational, arbitrary and unreasonable judicial classification of the types of local governmental entities that can be sued for wrongs committed during the course of operating an airport, in violation of petitioner's equal protection and due process rights under the Fourteenth Amendment of the United States Constitution, or alternatively, under the facts of and as applied to this case, does Georgia Code Section 23-1502 in and of itself constitute an irrational, arbitrary and unreasonable legislative classification of the types of local governmental entities that can be sued for wrongs committed during the course of operating an airport, in violation of petitioner's equal protection and due process rights under the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

On February 26, 1973, after receiving clearances from the F.A.A.-operated control tower, a Learjet Model 24 airplane, F.A.A. Registration No. N-454RN, owned by Southeast Machinery, Inc. and operated by Machinery Buyers Corp., made an IFR takeoff from Runway 20L at DeKalb-Peachtree Airport, Atlanta, Georgia. The desti-

nation of the interstate flight was Miami, Florida. Immediately after becoming airborne, and while within the boundaries of the airport and at an altitude of approximately 400 feet, the jet engines of the airplane ingested a large number of starlings or similar birds, resulting in sudden loss of power in both engines, the crash and total destruction of the airplane, and the death of all seven persons aboard. (J.A. 139.)

The transcript of the radio communications between the airplane and the F.A.A. ground and tower control facilities describe best the events that occurred. (Time references are to Greenwich Mean Time; "PDK GC" refers to the Ground Control facility; and "PDK TWR" refers to the Tower Control facility.)

TIME	:	1451
N454RN	:	Ground Learjet four five four Romeo November
PDK GC	:	Lear four five four Romeo November Peachtree Ground
N454RN	:	Put us on request I F R to ah Miami Beach and we're ready to taxi in about five minutes
PDK GC	:	Lear four five four R N Roger
TIME	:	1453
N454RN	:	Lear four fifty four R N's I F R to Miami
TIME	:	1453
PDK GC	:	Lear four five four R N Peachtree Ground taxi to runway two zero left wind zero six zero degrees at five altimeter three zero two zero follow the Bonanza approaching from your right front
N454RN	:	Roger

TIME	:	1457
PDK GC	:	Lear four five four Romeo November clearance
N454RN	:	Go ahead
PDK GC	:	Lear four five four Romeo November cleared as filed maintain three thousand expect flight level four one zero within three five miles squawk two zero four one just before departure
N454RN	:	Roger we're cleared as filed to maintain three expect four one oh in three five miles squawk two zero four one departure nineteen three
PDK GC	:	Lear four five four Romeo November departure control frequency one one niner point three contact tower one two zero point niner when ready for departure
N454RN	:	(unintelligible, sounds like er and is probably the last part of the word roger)
TIME	:	1459
N454RN	:	How much a delay for Romeo November sir
PDK TWR	:	Well your number four for departure
N454RN	:	Ok how much a delay for all of us
PDK TWR	:	I don't know we gonna get the first one out right away
N454RN	:	OK
TIME	:	1510
PDK TWR	:	Lear ah four five four Romeo November taxi into position and hold
N454RN	:	Roger
TIME	:	1511
PDK TWR	:	Lear four five four Romeo November turn ah right heading two five zero for vectors cleared for takeoff
N454RN	:	Roger

TIME	:	1512
PDK TWR	:	Lear four five four Romeo November it appeared the ah left engine laid a pretty good layer of smoke out of the left side there for approximately ah three or four hundred feet ah over
N454RN	:	We just hit some birds
PDK TWR	:	Ah roger ah you return turning to land
N454RN	:	Don't believe we gonna make it
PDK TWR	:	Can you tell us where your going down (J.A. 141-143.)

After the crash the remains of many dead birds were found at or near the departure end of Runway 20L, and bird remains and particles of protein matter were found on the airplane windshield and center post and in the airplane engines. Also, immediately prior to and after the crash large flocks of birds were located in and about the Airport boundaries and the adjacent garbage dump operated by DeKalb County. The sole physical cause of the crash was loss of engine power in both jet engines, resulting directly and solely from the ingestion of birds in the engines. (J.A. 143.)

Petitioner Fireman's Fund Insurance Company, which provided hull insurance to Southeast Machinery with respect to Learjet N-454RN, paid its insured for the hull loss and then filed this suit against respondent DeKalb County and the United States of America to recover for the $549,432.00 hull subrogation interest. (J.A. 144.) Jurisdiction over DeKalb County was based on diversity of citizenship and jurisdiction over the U.S.A. was based on the Federal Tort Claims Act. (J.A. 138.)

As amended, the complaint against DeKalb County alleged three principal claims: negligence; maintenance of

public and private nuisance; and breach of certain grant agreements entered into between DeKalb County and the F.A.A. concerning development of the county-owned and operated airport. (J.A. 136-175.)

In this case and in four other cases resulting from the catastrophe the District Court granted motions to dismiss filed by DeKalb County, on the theory that the concept of sovereign immunity barred any claims against DeKalb County. (P.A. 35a-53a.)

Petitioner (and plaintiffs in the other four cases) appealed to the Fifth Circuit Court of Appeals from the order dismissing respondent DeKalb County, and on January 30, 1976 the initial Fifth Circuit panel of Circuit Judges Godbold, Dyer and Morgan issued a decision reversing the District Court dismissal order. 526 F.2d 679. This initial Fifth Circuit decision held that DeKalb County was entitled to sovereign immunity as to petitioner's negligence and nuisance claims, but that under Georgia law sovereign immunity did not bar the breach of contract claim based upon petitioner's status as a third-party beneficiary of the safety covenants imposed upon DeKalb County by the F.A.A. in certain Grant Agreements. Circuit Judge Dyer dissented from the portion of the decision holding that petitioner could sue for breach of contract. The basis for his dissent was that federal common law applied to the breach of contract claim and that under federal common law petitioner lacked standing to sue as a third-party beneficiary.

Thereafter, respondent DeKalb County moved for rehearing en banc and on April 5, 1976 rehearing en banc was granted. 526 F.2d 688. On August 25, 1976, the Fifth Circuit sitting en banc, in an eight to five decision, adopted Circuit Judge Dyer's earlier dissent and in effect ruled

that DeKalb County was entitled to sovereign immunity as to *all* of petitioner's claims, including the breach of contract claim. 538 F.2d 643. The five dissenting members of the en banc Court were Chief Judge Brown and Circuit Judges Goldberg, Ainsworth, Godbold and Morgan, and they urged that petitioner did have standing as a third-party beneficiary to sue for DeKalb County's breach of the Grant Agreements. Four of the dissenting judges of the en banc court also argued that federal common law did not apply to the case.

On November 19, 1976 Fireman's Fund filed its timely petition for writ of certiorari, which was granted by this Court's January 17, 1977 Order. Such Order also consolidated this case (No. 76-700) with three other cases (Nos. 76-607, 76-659 and 76-722) involved in the decision below.

As the decision in question was entered with respect to respondent DeKalb County's motion to dismiss, it is necessary for this Court generally to be aware of the relevant allegations of petitioner's complaint, which allegations are set forth below.

Prior to the crash, DeKalb County had actual knowledge that birds could be ingested into jet engines, and that jet engine bird ingestion could cause an engine failure and crash. DeKalb County also had actual knowledge that a dangerous bird hazard and bird-attracting garbage dump existed at the Airport immediately adjacent to the jet runway, and that huge flocks of starlings and other birds had been attracted to the open garbage dump maintained by the County on the Airport premises. (J.A. 147.)

Pursuant to the authority and directions of Congress, the F.A.A. prior to the crash in question had issued Advisory Circular No. 150/522-3A, dated March 2, 1972,

entitled "Bird Hazards to Aircraft," in which the F.A.A. stated in part as follows:

> "Migratory birds, particularly waterfowl, are a hazard to aircraft due to their size and weight. In recognition of this potential hazard, F.A.A. Air Traffic Control and Flight Service Station facilities issue advisory information on bird activities when they are reported or when they have knowledge of such activities. Information given to pilots includes the position, species or size of bird if known, and their course and altitude." (J.A. 152.)

To cope with such bird hazards, the Advisory Circular stated that the F.A.A. operates as follows:

> "F.A.A. Air Traffic Control and Flight Service Station facilities coordinate with airport management for either appropriate alerting action by a Notice to Airmen when flocks of birds are noted to remain in the airport vicinity or for possible closing by a Notice to Airmen when flocks roost on runways." (J.A. 152.)

The duties of the F.A.A. tower personnel at the Airport are in part set forth in the Terminal Air Traffic Control Manual, 7110.8, one of the air traffic control manuals referred to in Part 65 of the Federal Aviation Regulations, in which Manual the following responsibilities of air traffic control personnel are listed:

> "If you observe or are informed of any condition which affects the safe use of a landing area:
>
> (a) Relay the information to the airport manager concerned.
>
> (b) Issue a Notice to Airmen publicizing an unsafe condition if you are unable to contact the airport manager (of if there is no airport manager designated) and then inform the manager as soon as practicable. . . ."

"122. BIRD ACTIVITY
ADDNL SVC

"a. Issue advisory information on the position and, if known, species or size of birds, and their course of flight and altitude if you believe that the safety of flight in that area may be affected. Do this for at least 15 minutes after receipt of such information from pilots or from adjacent facilities unless visual observation or subsequent reports reveal the activity is no longer a factor."

"1552. BIRD ACTIVITY INFORMATION

"a. Issue advisory information on pilot-reported or radar-observed and pilot-verified bird activity. Include position, species or size of birds, if known, course of flight and altitude. (E)

Phraseology:

FLOCK OF (Species, if known)/(size, if known) BIRDS, (number) O'CLOCK (number of miles) MILES (direction) BOUND:

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

FLOCK OF (species, if known)/(size, if known) BIRDS (direction) BOUND ALONG (flyway or geographical route):

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

FLOCK OF/NUMEROUS FLOCKS (species, if known)/(size, if known) BIRDS, VICINITY (location):

LAST REPORTED AT (altitude, as determined from pilot report).

or

ALTITUDE UNKNOWN.

b. Relay bird activity information to adjacent facilities and to FSS's whenever it appears it will became a factor in their areas." (J.A. 153.)

Public knowledge of the hazards of birds to aircraft has existed at least since the 1940's, when the F.A.A. published a report containing detailed statistics on the collision of aircraft with birds, which report was admitted into evidence in *Rapp v. Eastern Air Lines, Inc., U.S.A., et al.*, 264 F.Supp. 673 (E.D.Pa. 1967), and which report included 1946 statistics on bird strikes by aircraft, there being more than one such strike per day during this early aviation period. (J.A. 155.)

DeKalb-Peachtree Airport is located in DeKalb County on land owned by the County, and the Airport is owned, operated, managed and maintained by the County. The Airport has paved runways, hangars, servicing and parking facilities, a control tower with radio facilities, an instrument landing system control center, and access to other radio and navigational aids. The Airport is operated by the County for the public welfare and benefit of all citizens and is subject to the jurisdiction of the F.A.A. (J.A. 156.)

DeKalb County acquired the Airport by way of quitclaim deed from the United States General Services Administration in 1960. Since 1966 DeKalb County has utilized the Airport site for dumping raw garbage. Employees of DeKalb County at the Airport have observed and reported a significant increase in the number of birds at the Airport following the utilization of the Airport site for raw garbage disposal. (J.A. 156.)

The untreated raw garbage, refuse, trash, offal, filth and other waste material deposited by DeKalb County on the Airport created a large area constituting an attraction to birds and causing huge flocks of birds to congregate about the Airport, the runways, ends of runways and other areas within the Airport boundaries. The attractiveness of the open garbage dump to birds was increased by the failure of DeKalb County to remove trees, undergrowth and high grass from the area of the open garbage dump and along the runways, which foliage provided roosting, nesting and basking areas for the large flocks of birds attracted to the garbage dump. The birds at times remained, walked and ran upon said runways and adjacent grass areas at the sides and ends of the runways, and congregated in the numerous trees on and about the Airport area. The birds when located upon the Airport grounds often flew aloft in large flocks many times each day as aircraft would take off, approach, land or fly near said Airport. The flocks of birds at the Airport constituted a continuous hazard to the safety of aircraft and to the safety and lives of the crews and passengers therein and to persons residing and located upon the ground in the vicinity of the Airport. (J.A. 157-158.)

Beginning in June, 1962, the Federal Government entered into six Grant Agreements with DeKalb County, pursuant to which at least $1,025,224.06 was paid to the County for the purpose of assisting the County in the improvement and development of DeKalb-Peachtree Airport. Associated with the various Grant Agreements is an airport layout plan developed by DeKalb County and approved by the F.A.A. graphically illustrating the development and proposed development of the airport facilities and the use of the land included within the airport boundaries. Such use does not include an open gar-

bage dump or any other dumping ground for garbage. (J.A. 159.)

Prior to the crash in question, the F.A.A. recognized that the existence of the open garbage dump at the Airport constituted an attraction to huge flocks of birds, and that such birds constituted a definite hazard for aircraft taking off and landing at the Airport. From March 9, 1970, to February 14, 1972, the F.A.A. communicated with DeKalb County, both by letter and by conference, relative to alleviation of the bird hazard caused by the existence of the open garbage dump on the Airport site. In February 1971, the F.A.A. was advised by DeKalb County that the dump would be closed by August, 1972, but DeKalb County did not close the dump and the hazard continued. (J.A. 160.)

The Grant Agreements entered into between the F.A.A. and DeKalb County under the Airport and Airway Development Act imposed the following obligations on DeKalb County:

> "The Sponsor [DeKalb County] will keep up to date at all times an airport layout plan . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to approval of the F.A.A., which approval shall be evidenced by the signature of a duly authorized representative of the F.A.A. on the face of the airport layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport." (J.A. 161.)

As previously noted, the airport layout plan made no mention of an open garbage dump on the Airport. The

Grant Agreements also imposed the following specific covenants on the County:

"The covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, . . ."

"The Sponsor will operate the Airport as such for the use and benefit of the public. . . . The Sponsor may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public."

"The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes."

"In addition, the Sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the Airport, in any portion of a runway approach area in which the Sponsor has acquired, or may hereafter acquire, property interests permitting it to so control the use made of the surface of the land."

". . . The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the F.A.A., if such changes or alterations might adversely affect the safety, utility, or efficiency of the Airport."

"Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with

normal airport operations including landing and takeoff of aircraft." (J.A. 161-163.)

DeKalb County violated the Grant Agreement covenants by willfully permitting the existence of an open garbage dump and bird hazard on the Airport site and adjacent to Runway 20L. The covenants ex facie were intended for the benefit and safety of aeronautical users of the Airport, and petitioner's insured was a third-party beneficiary of said Grant Agreement covenants. Accordingly, DeKalb County is liable for breach of such Grant Agreement covenants. (J.A. 163.)

By reason of the existence of the open garbage dump prior to and on February 26, 1973, the operation of the Airport by DeKalb County constituted a public and private nuisance and a hazard to public safety, and the maintenance of the open garbage dump at the Airport constituted an airport hazard as defined in 49 U.S.C. § 1711, and was a violation of the 49 U.S.C. § 1718(3). (J.A. 163.)

The reckless nature of the negligence and dereliction of duties of DeKalb County is exemplified by the fact that prior to the fatal crash in question, DeKalb County had received notices of several airplane bird-strike and near bird-strike incidents within the airport boundaries, but despite this knowledge of prior incidents DeKalb County failed to take any action at all to prevent a recurrence of such incidents. (J.A. 170.)

The Airport is not owned, operated, managed and maintained by DeKalb County as a governmental function or enterprise, but, instead, is owned, operated, maintained and managed by DeKalb County as a proprietary or ministerial function or enterprise. DeKalb

County leases substantial portions of the Airport to private companies engaged in commercial operations for profit; some of such leases are for fixed rental amounts plus a percentage of the revenues or income derived by the tenants from their commercial operations; the revenues thus obtained by DeKalb County are not insignificant, but are substantial; and the Airport is owned, operated, managed and maintained by DeKalb County primarily as a source of revenue for the County. In effect, with respect to the ownership, operation, management and maintenance of the Airport, DeKalb County acts as a private landlard and not as a governmental entity. (J.A. 170-171.)

Prior to the accident, DeKalb County purchased a liability insurance policy providing bodily injury liability insurance and $1,000,000.00 property damage liability insurance with respect to the ownership, operation, management and maintenance of the Airport, and petitioner's claim falls within the limits of such policy. Such insurance contains a "Waiver of Governmental Immunity" rider which provides as follows:

> "It is agreed that the Company waives any right to deny liability under the policy or to refuse payment within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and employees and its immunity from suit as an agency of the State performing governmental functions." (J.A. 171-172.)

As the rulings in question were entered on the County's motion to dismiss, it is axiomatic that for purposes of decision herein the above-summarized allegations of the complaint must be accepted as true. *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir. 1966).

So that the Court will be aware that such allegations

are founded upon *real facts*, however, and so that the Court may be made aware of the enormity of the bird hazard that existed at the Airport as a result of the County's insistence upon maintaining an open garbage dump on the Airport premises, petitioner has attached as Exhibits to this brief some of the documentary evidence adduced in the trial court during the process of discovery depositions, as follows:

Exhibit B—log of bird sightings or bird counts made by F.A.A. tower controllers at the Airport.

Exhibit C—written notices of prior airplane-bird strikes at the Airport.

Exhibit D—letters to and from the F.A.A. and DeKalb County concerning the bird hazard and garbage dump.

Exhibit E—series of court orders entered in suit filed by F.A.A. against DeKalb County fourteen days after the crash in question, seeking enforcement of the Grant Agreements and alleviation of the bird hazard.

SUMMARY OF ARGUMENT

I.

The statutory and contractual covenants in question ex facie are intended to protect and provide for the safety of aeronautical users of the Airport, and such covenants imposed on DeKalb County the duty to alleviate airport hazards, to use airport premises only for purposes compatible with normal airport operations, and to operate and maintain the airport in a safe and serviceable condition.

Such statutory and contractual covenants were intended solely and exclusively for the benefit of aeronauti-

cal users of the airport, such as petitioner's insured, and petitioner's insured clearly falls within the class of persons intended to be protected by such covenants. Moreover, petitioner's injury is not imaginary, but is real and immediate. And neither the Grant Agreements nor the Airport and Airway Development Act nor the legislative history of such Act evince any intent that petitioner's claims be precluded from review.

Under both Federal Common law and the law of Georgia petitioner has standing as a third-party beneficiary to sue the County for breach of the statutory and contractual covenants in question, and the decision below is clearly erroneous.

II.

Aviation or aeronautical commerce is extensively and pervasively regulated by the Federal Government, and such federal regulation extends to and completely encompasses the activity of local governmental entities and agencies in operating and maintaining public, federally funded airports. Such federal regulation of necessity preempts any local laws that would burden or conflict with the purposes of and policies explicit in the federal regulation.

By voluntarily seeking and obtaining ownership of and operating rights to the Airport in question from the General Services Administration, and by voluntarily seeking and obtaining in excess of a million dollars in federal aid under the Airport and Airway Development Act, and by voluntarily executing Grant Agreements with the F.A.A., DeKalb County entered a federally regulated area of interstate commerce and subjected itself to federal regulation of airport activities. As a matter of federal law DeKalb County thereby waived its sover-

eign immunity to the extent of private claims involving rights and remedies implicit in the federal regulation.

To rule otherwise would impede substantially the federally expressed concern for aviation safety (and elimination of airport hazards) explicit in the Act and Grant Agreements, and would impose an unconstitutional burden on interstate commerce and the rights of interstate aeronautical travellers.

III.

Under Georgia law the statutory authority for a city or a county to own and operate an airport is the same, and under Georgia law the operation of an airport by either a city or county is a proprietary—not governmental—function. Georgia law also provides that a city has no sovereign immunity with respect to claims arising from the operation of an airport.

Georgia Code Section 23-1502 cannot constitutionally be interpreted to bar petitioner's claims against DeKalb County, as the result of such an interpretation would be the creation of a scheme of classification that would allow suits against some local governmental entities for the negligent proprietary operation of airports but would prohibit identical suits against other local governmental entities for the identical negligent proprietary operation of identical airports, in violation of petitioner's rights to equal protection of the laws and due process.

ARGUMENT AND CITATION OF AUTHORITIES

I. The Decision Below Is Erroneous And In Irreconcilable Conflict With Both Federal Common Law And Relevant State Law.

The cornerstone of the ruling below is the conclusion that petitioner is a mere "incidental beneficiary" of the

statutory and contractual duties imposed on DeKalb County by the Grant Agreements, federal legislation, and regulations in question, and that as an "incidental" rather than "intended" beneficiary petitioner has no standing to sue for breach of contract. 526 F.2d 686-687. In this connection, a majority of the Court below concluded that the "only purpose" of the statutory and contractual covenants relied upon by petitioner "was to make sure that federal funds were effectively employed and not wasted." 526 F.2d 687.

While petitioner concedes that certain provisions of the Federal Act and Grant Agreements in question are obviously designed to guard against waste or misuse of federal funds [see 49 U.S.C. § 1716(c)(1) (B) and (C), § 1718(7), (8), (9) and (10), § 1720, § 1721, §1725 and § 1726, and paragraph 9 of the Grant Agreement appearing at page 202 of the Joint Appendix], petitioner contends that the particular statutory and contractual covenants and regulations involved in this case are quite clearly intended *solely and directly* for the benefit of aeronautical users of the Airport.

A. As an aeronautical user of the Airport, petitioner's insured was an intended and direct beneficiary of the duties and obligations imposed on DeKalb County.

49 U.S.C. § 1718 expressly provides that prior to the grant of federal funds the recipient of such funds shall make the following written promises, among others:

(1) The airport will be suitably operated and maintained;

(2) Aerial approaches will be cleared and protected;

(3) Existing airport hazards will be mitigated, and

the establishment or creation of future airport hazards will be prevented; and

(4) The use of land adjacent to or in the immediate vicinity of the airport will be restricted to activities compatible with normal airport operations, including landing and takeoff of aircraft.

These statutory duties on their face are related to *aviation safety*, and not to the subject of possible waste or misuse of federal funds.

The federal regulations issued to "flesh out" the Act confirm that the fostering of aviation safety is one of the primary purposes of the Act. For example, 14 CFR § 151.5(b)(1) specifies that an airport development project must provide for the planning or development of an airport that is "safe, useful, and usable." See also 14 CFR § 152.5(b).

In the Grant Agreements executed pursuant to the requirements of the Act and the regulations issued thereunder, DeKalb County specifically agreed:

(1) To operate the Airport "for the use and benefit of the public" (J.A. 217);

(2) That it would "operate and maintain in a safe and serviceable condition the Airport and all facilities . . . which are necessary to serve the aeronautical users of the Airport . . . and will not permit any use thereon which would interfere with its use for airport purposes." (J.A. 218.)

(3) That it would not erect or permit the erection of any structure or facility which would interfere materially with the use or operation of the Airport (J.A. 218.); and

(4) That it would restrict the use of land to purposes and activities compatible with normal airport opera-

tions, including landing and takeoff of airplanes. (J.A. 210.)

The legislative history of the Act confirms that the purpose of the above-summarized statutory and contractual duties is to provide for the safety of airport users. For example, H.R. Rep. No. 91-601, 91st Cong., 2nd Sess. (1970), provides:

> "The problem of congestion in terms of cost and inconvenience, as serious as it is, is secondary to the problem of maintaining the safety of aircraft and air travelers."
>
> * * *
>
> "The basic elements of the aviation system are the airman (pilot), vehicle (aircraft), and the airport. In order to provide for safety, the Congress has legislated that the airman and vehicle shall meet standards considered necessary to safety of flight and that each be certificated by the Federal Government. However, airports are also essential to the conduct of flight operations and conditions at an airport can seriously influence the safety of flight."
>
> * * *
>
> "Section 18 of the reported bill requires that the Secretary receive a number of assurances prior to his approving a project for airport development. They are designed to assure, among other things, that airports to which a project relates will be . . . suitably operated and maintained. Also, requirements are included respecting . . . the removal or mitigation of airport hazards, . . ." 1970 U.S. Code Cong. and Ad. News, pp. 3051, 3058 and 3071.

The particular statutory and contractual covenants at issue here are *not* intended simply to prevent a wasting of Federal funds, but, instead, have as their primary objective the safety of aeronautical users of public,

federally funded airports. There can be no doubt at all that aeronautical users of the Airport were the *primary and intended* beneficiaries of the contractual and statutory covenants at issue, and that Airport aeronautical users fall well within the class of persons intended by Congress to be protected and benefitted by such covenants.[2]

B. The decision below conflicts with Federal Common Law.

The contracts in question are "Federal" contracts, in that the Federal Government is one of the contracting parties and in that the contracts themselves, together with almost all of their specific terms, are expressly authorized by Federal legislation and regulations. Moreover, the contract terms are uniform and standard nationwide, regardless of the identity or geographical location of the non-Federal contracting party. Last, the contracts affect and deal with a particular area—aeronautical commerce —that is the subject of pervasive and preemptive regulation by the Federal Government.

Petitioner therefore acknowledges that there may be cogent reasons for the application of Federal common law to the question of whether petitioner has standing as a third-party beneficiary to sue for the County's breach of the Grant Agreement covenants. See *United States v. Seckinger*, 397 U.S. 203 (1970); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *First National Bank, Henrietta v. Small Business Administration*, 429 F.2d 280 (5th Cir. 1970); *Cf., Hinderlider v. La Pluta River &*

[2] Indeed, it would seem that the primary purpose of *all* federal regulation of aviation is protection of the safety of aeronautical travellers. See the discussion of similar federal regulation of aviation, set forth in *Gabel v. Hughes Air Corp.*, 350 F.Supp. 612 (C.D.Cal. 1972).

Cherry Creek Ditch Co., 304 U.S. 92 (1938). [On occasion the lower Federal courts have found it especially appropriate to fashion Federal common law in cases involving aviation or aeronautical commerce. See *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied* 421 U.S. 987 (1975); and *Humphreys v. Tann*, 13 CCH Avi. 18, 229 (E.D. Mich. 1976).]

Assuming, therefore, that Federal common law is determinative of the issue at hand, the decision below conflicts with the applicable Federal common law and is for such reason erroneous.

In the leading case of *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972), the Ninth Circuit focused on the precise question involved here, namely, whether non-contracting parties have standing as third-party beneficiaries to sue for breach of Grant Agreements identical to those *sub judice*. 451 F.2d 954.

After reviewing the grant agreement covenants, statutory provisions and legislative history, the Ninth Circuit concluded that plaintiffs were *intended* beneficiaries of the particular Grant Agreement covenants involved in that case:

> "There is a further issue for this Court to resolve—whether or not Inglewood has standing to enforce the Federal Aviation Administration grant agreements with Los Angeles under the provisions of 49 U.S.C.A. section 1716(c) (3) and 1718(4). The district court found that sec. 1718(4) [then sec. 1110(4)] was only intended to deal with the safety of airplanes on takeoff or landing; that the plantiffs were not the intended beneficiaries of the grant agreements; and that the statutes imposed no duty on the defendant City of Los Angeles to give 'fair consideration' to neighboring residents. [C.R., pp. 372-373] Both parties on appeal

have treated the question as being whether or not the plantiffs have standing to sue under the grant agreements.

"We turn first to the question of the purpose of sections 1716(c) (3) and 1718(4). The legislative history is silent regarding the intention of Congress in enacting sec. 1716(c) (3). However, the legislative history of sec. 1718(4) [sec. 1110(4)] supports the theory that flight safety was not the sole purpose of the section. Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D.Pa. 1967) cited by the district court and the appellee only deals with sec. 1718(3) [then sec. 1110(3)]. We conclude, contrary to the District Court, from the language of sec. 1716(c) (3) and the legislative history of sec. 1718(4) that each were intended by the Congress to insure that the welfare of persons living close by airports which were to receive government funds to engage in development projects would receive 'fair consideration' by the Secretary of Transportation." 451 F.2d 954-955. (Footnotes omitted.)

After ruling that plaintiffs possessed the requisite standing to sue (451 F.2d 955), the Ninth Circuit distinguished and refused to follow the third-party beneficiary cases relied upon by the Fifth Circuit in the opinion below:

"Los Angeles attempts to find support for its position in a series of cases holding that third parties cannot sue on grant agreements between airports and the Federal Aviation Administration based upon third-party beneficiary contract doctrines. Port of New York Authority v. Eastern Air Lines, Inc., 259 F.Supp. 745 (E.D.N.Y. 1966); City and County of San Francisco v. Western Air Lines, Inc., 204 Cal.App.2d 105, 22 Cal.Rptr. 216 (1962). We note that in both cases the plaintiffs were airline companies and the provisions of the Federal Airport Act they were attempting to enforce were not the provisions plaintiffs are attempting to enforce in this case.

> "While we express no opinion as to the merits of those cases, we do not find them controlling in this case. If Los Angeles made the assurances required by sec. 1716(c) (3) and sec. 1718(4) in applying for various grant agreements, *then Inglewood must certainly be included within the category of intended beneficiaries of those assurances*. Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents of the area. Any other interpretation of sec. 1716(c) (3) and sec. 1718(4) deprives them of any meaning or effect." 451 F.2d 955-956. (Emphasis added.)

The Seventh Circuit Court of Appeals has also indicated that private, non-contracting parties "may qualify as intended beneficiaries" under the particular Act and type of F.A.A. Grant Agreements involved here. *Luedtke v. County of Milwaukee*, 521 F.2d 387, 391 (7th Cir. 1975). *Cf.*, the District Court and Circuit Court decisions in *Town of New Windsor v. Ronan*, 481 F.2d 450 (2nd Cir. 1973), and 329 F.Supp. 1286 (S.D.N.Y. 1973).

And in the landmark airplane-bird ingestion case, *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D.Pa. 1967), the District Court's judgment of tort liability in favor of private, non-contracting parties and against the defendant (who was a party to Grant Agreements) was based in large part upon the defendant's breach of duties and obligations imposed by F.A.A. Grant Agreements identical to the ones involved here.

The only other cases petitioner has been able to locate dealing with the type of F.A.A. Grant Agreements involved here are *Port of New York Authority v. Eastern Air*

Lines, Inc., 259 F.Supp. 745 (E.D.N.Y. 1966); *Eastern Air Lines, Inc. v. Town of Islip*, 229 N.Y.S.2d 117 (N.Y. Sup.Ct. 1962); and *City and County of San Francisco v. Western Air Lines, Inc.*, 204 Cal.App.2d 105, 22 Cal.Rptr. 216 (1962). Although all three of these cases denied third-party beneficiary status to the plaintiffs there involved, such cases are easily distinguishable from the case at bar.

The *Port of New York Authority* and *Western Airlines* cases involved Grant Agreement covenants totally different from the ones involved here, and the plaintiffs in those two cases were certificated air carriers who quite obviously were not benefitted in the least by the particular covenants they sought to enforce.

The *Town of Islip* case was a decision by a single state court trial judge who applied *New York law*, not Federal common law. Moreover, the trial judge's ruling was obviously influenced by his positive finding that the real cause of the accident was plaintiff's own negligence. See 229 N.Y.S.2d 119 and 120.

Although it did not involve an F.A.A. Grant Agreement, the recent decision of the Third Circuit in *Rauch v. United Instruments, Inc.*, 45 U.S. L. Week 2333 (3rd Cir. 1976), sheds light on the question of whether parties in the category of petitioner's insured are intended beneficaries of Federal aviation statutes and regulations. As reported at 45 U.S. L. Week 2333, the Third Circuit held:

> "In Cort v. Ash, 422 U.S. 66, 43 LW 4733 (1975), the U.S. Supreme Court set forth guidelines for deciding whether a private individual who has been injured by a violation of a federal statute can sue under that statute even though it does not expressly provide for a private remedy. The first question to be considered under the Cort analysis is whether the prospective

> plaintiff is one of the class for whose especial benefit the statute was enacted. The congressional objective of safety permeates the Federal Aviation Act, and the fostering of safe air travel was the congressional motive for giving the administrator the authority to prescribe minimum safety standards governing aircraft applicances. In a broad sense, Congress was seeking to assure the personal safety of all persons who are potential passengers or crew members of aircraft as well as those on the ground whose lives and property might be endangered by accidents resulting from unsafe aircraft. *These are persons who constitute the class for whose especial benefit the safety provisions of the statute were enacted.*" (Emphasis added.)

Cf., Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973).

Petitioner also points out that in *Hebah v. United States*, 428 F.2d 1334, 1339 (Ct.Cl. 1970), the Court ruled: "It is settled, moreover, that an intended third-party beneficiary of a government contract can sue under § 1491." Likewise, in *United States v. Huff*, 165 F.2d 720 (5th Cir. 1948), third-party beneficiaries of a government lease were allowed to sue the government for breach of the lease.

The decision below is in direct conflict with the Federal common law expressed in the above-cited cases. Such decision also conflicts with other, better-reasoned decisions of the Fifth Circuit itself.

In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), the Fifth Circuit held that black children were third-party beneficiaries of anti-discrimination covenants contained in federal aid grant agreements between the local school board and H.E.W., and that such children had standing as third-party beneficiaries to sue the local school board for breach of such covenants. In so ruling,

the Fifth Circuit expressly adopted the District Court holding that "Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools." 370 F.2d 847.

And in *Seaboard Air Line R.R. v. Crisp County, Georgia*, 280 F.2d 873 (5th Cir. 1960), *cert. denied*, 375 U.S. 942 (1961), the Fifth Circuit held that a private party should be allowed to maintain a tort-damage action against a Georgia county because the Federal Power Act and a license granted to the County under such Act imposed a duty on the County to protect the property of private third parties.

In concluding that petitioner lacked standing as a third-party beneficiary to sue for breach of the Grant Agreement covenants, the Court below not only failed to recognize and follow the federal common law explicit in the cases discussed above, but applied the wrong test to determine whether plaintiff possessed standing as a third-party beneficiary.

The Court below held that under federal common law the test of standing as a third-party beneficiary was whether the "federal" contract itself clearly manifested an intent to compensate the third party in damages in the event of a breach. 526 F.2d 686-687. *This measure or test of standing was not distilled from decisions of this Court or from decisions of other Federal Courts.* Instead, this test of standing was derived from the forty-four year old First Restatement of Contracts, *and it is clearly an erroneous and inapplicable test.*

Under federal common law, the true measure of standing as a third-party beneficiary is a three-pronged test:

(1) does plaintiff's personal stake in the case satisfy the concrete adverseness required by Article III of the Constitution? (2) does plaintiff fall within the class of persons or zone of interests intended to be benefitted or protected by the contractual or statutory provisions in question? and, (3) does the contract or statute in question preclude suit or judicial review? See *Cort v. Ash*, 422 U.S. 66 (1975); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970); *Barlow v. Collins*, 397 U.S. 159, 164-165 (1970); and *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 955 (9th Cir. 1972).

Petitioner's claims herein clearly measure up to these three yardsticks. First, petitioner's injury is not imaginary, but is real and immediate. Second, petitioner falls within the class of persons intended to be protected by the statutory and contractual covenants in question, as such covenants on their face are intended to protect, and provide for the safety of, "aeronautical users of the Airport."

And third, neither the Grant Agreements nor the Airport and Airway Development Act, nor the legislative history of such Act, preclude petitioner's claims against DeKalb County. To the contrary, allowance of petitioner's claims can serve only to foster and enforce the United States' expressed concern for aviation safety and the public policy considerations inherent in the Act and Grant Agreements in question.

Last, petitioner wishes to remind this Court of two principles of "hornbook" law concerning third-party beneficiaries:

(1) In determining whether a contract manifests an intent to benefit a third party, the intent of the prom-

isee (here, the F.A.A.) must be examined, *and not the intent of the promisor* (here, DeKalb County). See 4 Corbin on Contracts, Sec. 776.

(2) It is not necessary that the promisee intended to create a "right" in the third party. All that is required is that the promisee intended for the promisor to render a performance that would be beneficial to the third party. See 4 Corbin on Contracts, Sec. 777.

Under these traditional tests, and under the tests enunciated by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), petitioner clearly has standing as a third-party beneficiary to sue DeKalb County for breach of the statutory and contractual covenants in question.

C. The decision below Conflicts with relevant State Law.

Turning now to the relevant state law, we note initially that the particular issues at hand here do not really involve the Federal Government and do not really touch upon the rights and duties of the Federal Government. Moreover, the accident in question occurred in Georgia and DeKalb County's performance (and nonperformance) of the contract also occurred in Georgia. Last, it would seem that the issues of breach *vel non*, damages, and other similar issues would under any set of circumstances be determined by local law.

Under these conditions, this Court on several occasions has believed it appropriate to employ state law to determine the general type of issue here involved, particularly (a) when there is no significant conflict between some identifiable federal policy and the relevant state law, and (b) when the relevant state law would serve to foster or enhance any federal policy implicit or explicit in the so-

called "Federal" contract. See *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); *United States v. Yazell*, 382 U.S. 341 (1966); *Bank of America National Trust & Savings Ass'n v. Parnell*, 352 U.S. 29 (1956). *Cf.*, *DeSylva v. Ballentine*, 351 U.S. 570 (1956).

In any event, if federal common law does not govern the question of whether petitioner has standing as a third-party beneficiary to sue for breach of the Grant Agreement covenants in question, then *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), dictates that the substantive law of the forum state must govern such question.

Georgia Code Section 3-108 provides: "The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

In *Sheppard v. Bridges*, 137 Ga. 615, 74 S.E.2d 245 (1912), the Georgia Supreme Court held that "the great weight of authority is to the effect that if the promise is made for the purpose of conferring a benefit on a person, though he be not a party to the contract, or furnish the consideration for the promise, he can bring suit upon it." To the same effect are *Holland v. Phillips*, 94 Ga.App. 361, 94 S.E.2d 503 (1956); *Smith v. Ledbetter Brothers, Inc.*, 111 Ga.App. 238, 141 S.E.2d 322 (1965); *M. R. Thomason & Associates v. Wilson*, 125 Ga.App. 658, 188 S.E.2d 805 (1972); and *State Construction Company v. Johnson*, 88 Ga.App. 651, 656, 77 S.E.2d 240 (1953).

The Georgia law regarding third-party beneficiaries of contracts also applies to suits against counties, and counties are not immune from third-party beneficiary suits. To demonstrate this point we need only refer to the full bench decision of the Georgia Supreme Court in

Deason v. DeKalb County, 222 Ga. 63, 65 148 S.E.2d 414 (1966):

> "Counties are empowered to sue or be sued in any court. Code § 23-1501, but 'a county is not liable to suit for any cause of action unless made so by statute.' Code § 23-1502. However, an exception exists where a county breaches a contract it was authorized by law to undertake. . . . 'Whenever a county is made liable by statute for a demand, or is authorized by statute to contract, and in pursuance of such power does contract, *then an action will lie against it to enforce such liability, or to enforce any rights growing out of such contract*, although there is no statute expressly authorizing the bringing of an action for such purpose. . . . In other words, a county can always be sued upon any liability against it created by statute, or for breach of any valid contract which it is authorized by law to make.'
>
> " 'Liability to suit may be shown by indicating that the claim arises . . . as an incident in the performance of an undertaking by the county authorized by statute.' " (Emphasis added.)

Petitioner also calls attention to *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960) (involving the very same airport and very same county involved in the case at bar), where the Georgia Court of Appeals held (102 Ga.App. 865):

> "In its motion for rehearing, the county urges that this court overlooked the decision in *Purser v. Dodge County*, 188 Ga. 250 (3 S.E.2d 574), which held that a county is not liable for a suit for any cause of action unless made so by statute. As we construe the Uniform Airports Act, Code Chapter 11-2, which expressly extends its coverage to counties, as shown in the original opinion, the county is authorized to contract as it did here. *The logical inverse inference of the act is that, to the extent the county is authorized to contract, it*

also may be sued upon the contract for breach or for interference with performance." (Emphasis added.)

See also *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973) (in which the Georgia Supreme Court upheld a death claim against a county based upon a tort arising out of breach of contractual commitments between the county and Georgia Power Company); and *Seaboard Air Line R.R. v. Crisp County, Georgia*, 280 F.2d 873, 877-878 (5th Cir. 1960)*cert. denied* 375 U.S. 942 (1961) (in which the Fifth Circuit held: "Here the County was under a duty imposed by the Federal Power Act to protect the Seaboard's property, and thus the Act created a tort liability.")

From the foregoing, it cannot be denied that if federal common law does not apply to the question at hand, then the decision below is plainly erroneous and in irreconcilable conflict both with the mandate of *Erie R.R. v. Tompkins* and with the decisions of the highest appellate courts of Georgia.

Summarizing, the decision below should be reversed because:

(a) If federal common law applies to the question under consideration, then the decision below is in irreconcilable conflict with federal common law, with the decisions of other Federal Courts, and with the public policy inherent in the Grant Agreements, the Act itself, and the legislative history of the Act.

(b) If state law applies to the question under consideration, then the decision below is in irreconcilable conflict with the mandate of *Erie R.R. v. Tompkins* and with the law of Georgia.

II. The Paramount And Overriding Interest Of The Federal Government In Regulating All Phases of Aeronautical Commerce Preempts At Least To A Limited Degree Local Laws Concerning Sovereign Immunity.

From even a cursory review of the aviation laws and regulations promulgated by the various branches of the Federal Government, it is clear that aviation or aeronautical commerce is an extensively and pervasively federally regulated area of commerce, and that such federal regulation of necessity preempts any local laws that would burden or conflict with the purposes of and policies explicit in the federal regulation. See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (concurring opinion of Justice Jackson); *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968); *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F.Supp. 207, 212 (W.D.Ky. 1968), *aff'd* 407 F.2d 1306 (6th Cir. 1969).

As is evident from the Airport and Airway Development Act and the declaration of congressional policy therein, and as is also evident from the regulations issued under such Act and from the Grant Agreements themselves, the pervasive federal regulation of aeronautical commerce extends to and encompasses the activity of local governmental entities in operating and maintaining federally funded public airports.

In *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184 (1964), this Court held that when the States granted Congress the power to regulate commerce the States surrendered any portion of their sovereignty that would stand in the way of such regulation (377 U.S.

191-192), and that the States also waived their traditional sovereign immunity with respect to claims arising from voluntary activity by the States in the federally regulated area of commerce. (377 U.S. 192-198.)

Specifically, in overruling the state agency's sovereign immunity defense to the F.E.L.A. tort suit brought by plaintiffs in the *Parden* case, this Court ruled:

> "Moreover, such a result [sustaining of the sovereign immunity defense] would bear the seeds of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation . . . In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will." 377 U.S. 197-198.

See also *Maryland v. Wirtz*, 392 U.S. 183 (1968), where this Court stated:

> "In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." 392 U.S. 183.

This Court in *Wirtz* also said:

> "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be

forced to conform its activities to federal regulation." 392 U.S. 197.

Subsequent to this Court's ruling in *Parden, supra*, the Circuit Courts of Appeal have consistently overruled sovereign immunity defenses relied upon by state agencies engaged in various activities regulated by Congress. *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971) (by engaging in activity of paramount federal interest a state may waive its sovereign immunity, and whether such waiver has occurred is a question of federal law); *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied* 400 U.S. 829 (1970) (in the realm of interstate commerce congressional authority is supreme and overrides any state interest in sovereign immunity with respect to rights and remedies implicit in federal regulation); *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968) (by seeking and obtaining admission into federally regulated area of interstate commerce, and by obtaining permission to build and operate bridge and tunnel across bay, state agency waived any sovereign immunity to federal court suit for damage to ship which struck submerged light tower).

DeKalb County was not required to seek and obtain ownership of and operating rights to the Airport in question from the General Services Administration. DeKalb County was not coerced into seeking and obtaining $1,025,224.06 in federal aid under the Airport and Airway Development Act. And DeKalb County was not forced into signing Grant Agreements with the F.A.A. and in subjecting itself to federal regulation of airport and aviation activities.

DeKalb County *voluntarily* sought and obtained admission into a federally regulated area of interstate commerce,

and thereby *as a matter of federal law* waived its sovereign immunity to the extent of private claims involving rights and remedies implicit in the federal regulation. To rule otherwise would impede substantially the federally expressed concern for aviation safety (and elimination of airport hazards) *explicit* in the Act and Grant Agreements in question.[3]

Petitioner concedes that the above-discussed cases involved Federal regulatory statutes that specifically created some sort of cause of action or right to relief on the part of aggrieved persons, and that neither the Act nor the Grant Agreements in question here provide expressly for a private "cause of action." Petitioner believes, however, that with respect to the damage caused to petitioner by DeKalb County's maintenance of a statutorily proscribed airport hazard, use of land for purposes incompatible with airport operations, and breach of statutory and contractual covenants, a "private remedy" is implicit in the Act and Grant Agreements in question.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set forth four tests for determining whether a private remedy is available for conduct in violation of a federal statute:

> (1) Is plaintiff one of the class for whose special benefit the statute was enacted?
>
> (2) Is there any legislative intent, explicit or implicit, to create or deny a private remedy?
>
> (3) Is it consistent with the underlying purpose of the statute to imply a private remedy for plaintiff?
>
> (4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the

[3] Petitioner wishes to point out that in paragraph No. 66 of its complaint (J.A. 172), petitioner expressly, specifically and in detail, pleaded the "waiver of immunity" discussed in this portion of petitioner's brief.

States, so that it would be inappropriate to infer a cause of action based solely on Federal law?

Petitioner's claim passes all of these tests.

The statutory and contractual covenants at issue are on their face intended for the direct benefit of persons in the category of petitioner's insured. See pages 22-25 of this brief, *supra*, and *Rauch v. United Instruments, Inc.*, 45 U.S. L Week 2333 (3rd Cir. 1976).

There is no legislative intent behind the Act in question to deny a private remedy to plaintiff. Moreover, in *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), this Court concluded that "federal question" jurisdiction under 28 U.S.C. § 1331 "will support claims founded upon federal common law as well as those of a statutory origin." And the Court went on to state, "When we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . ." 406 U.S. 103. Surely the same reasoning applies to rights related to aeronautical commerce and/or "Federal contracts," such that petitioner's claim herein is a "federal" one falling within the Section 1331 grant of jurisdiction. See *City of Milwaukee, supra*, 406 U.S. 99-107.

Allowance of petitioner's claim as an implied "private cause of action" would be wholly consistent with the underlying purpose of the statutory and contractual covenants at issue, which underlying purpose is the mitigation of airport hazards and enhancement of the safety of aeronautical users of federally funded public airports.

And last, we are not dealing with an area of peculiar concern only to the States. To the contrary, the issues involved fall exclusively within the concern of Federal legislation and Federal policy. Thus, it is not inappropriate to infer a "Federal" cause of action. See *Bivens v. Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 392, 396-397 (1971), and *Gomez v. Florida State Employment Service*, 417 F.2d 569, 575-581 (5th Cir. 1969).

Petitioner's claim of an implied federal cause of action is not without judicial precedents, as the lower Federal courts have on several occasions ruled that "private" causes of action may be implied from various Federal aviation statutes and regulations. *Town of East Haven v. Eastern Air Lines, Inc.*, 282 F.Supp. 507 (D.Conn. 1968); *Gabel v. Hughes Air Corp.*, 350 F.Supp. 612 (C.D.Cal. 1972); *In Re Paris Air Crash*, 399 F.Supp. 732 (C.D.Cal. 1975). See also *Rauch v. United Instruments, Inc.*, 45 U.S. Law Week 2333 (3rd Cir. 1976); *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 537 (D.C.Cir. 1975), *rev'd on other grounds*, ___ U.S. ___, 96 Sup. Ct. 1978 (1976).

Summarizing, by voluntarily seeking admission into the federally regulated area of aeronautical commerce and by voluntarily subjecting itself to federal regulation in such area of commerce, DeKalb County *as a matter of federal law* has waived any immunity against petitioner's implied private cause of action based upon the County's breach of the statutory and contractual covenants in question.

At this juncture, we wish to point out that the cases discussed in this portion of our brief indicate that the waiver of immunity applies to tort suits, as well as to suits for breach of federally imposed duties (contractual or otherwise).

The decision below fails to apply the *federal law* discussed above; is in head-on conflict with the rulings of this Court and other Federal Courts concerning waiver of immunity and implied federal causes of action; and if

allowed to stand can serve only to burden interstate commerce and to thwart the explicit objectives of the Act and Grant Agreements in question.

For these reasons alone, this Court should reverse the decision below.

III. The Decision Below Has Resulted In An Unconstitutional Denial Of Equal Protection And Due Process.

Any interpretation of Georgia Code Section 23-1502 that would result in the application of sovereign immunity to bar petitioner's claims arising from DeKalb County's proprietary activity in owning and operating the airport would work a denial of equal protection and due process of law.

It is clear that under Georgia law a city can be sued in tort for negligence resulting from the city's proprietary activity in owning and operating an airport. *Caroway v. City of Atlanta*, 85 Ga.App. 792, 70 S.E.2d 126 (1952); Georgia Code Section 69-301.

It is also clear that under Georgia law DeKalb County's ownership and operation of the airport in question constitutes a proprietary activity or function. *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 118 S.E.2d 234 (1960).

And the statutory authority for either a city or a county to engage in the proprietary activity of owning and operating an airport is the same: the Uniform Airport Law, Georgia Code Sections 11-201, *et seq.*

Thus, if Code Section 23-1502 is construed to include *proprietary* activity as well as governmental activity, the result would be a scheme of classification that would allow suits against cities for negligent proprietary opera-

tion of airports but would prohibit identical suits against counties for identical negligent proprietary operation of identical airports. There is simply no legitimate or rational basis or reason for a legislative or judicial scheme of classification which has the effect of allowing prosecution of the former type of suit but disallows prosecution of the latter type of suit.

Any such legislative classification would be patently unconstitutional as a denial of equal protection of the laws, and any judicial ruling creating such a classification would be equally unconstitutional. [The constitutional guarantees of due process and equal protection apply not only to legislative enactments, but also to judicial interpretation of such enactments. *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930).]

This Court has held that any legislative classification by a State ". . . must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920). See also *Morey v. Doud*, 354 U.S. 457 (1958); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Reed v. Reed*, 404 U.S. 71 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *DeKalb Real Estate Board, Inc. v. DeKalb County*, 372 F.Supp. 748 (N.D.Ga. 1973); *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

And in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886), this Court summarized the equal protection guarantee in these now-famous words:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimi-

> nations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

More recently, in *Williamson v. Fortson*, 376 F.Supp. 1300, 1301 (N.D.Ga. 1974), a three-judge Federal Court defined the equal protection test thusly:

> "Courts normally subject legislation challenged under the equal protection clause to a standard of rationality. The state's goal need only be reasonable, and the statute need not be a perfect method to achieve the goal. If the Court can conceive of a rational viewpoint that justifies the statute, it will stand. When legislation affects certain fundamental liberties and rights, however, it is subjected to a stricter constitutional test—only a compelling state interest will suffice."

Obviously, the right to have a claim adjudicated by a court and jury on a basis equal with others similarly situated falls within the category of "fundamental rights and liberties" referred to in the above quotation.

The arguments we are presenting here do not constitute a departure from established case law, as there are several analagous judicial decisions that support the contentions we have outlined above.

In *Levy v. Louisiana*, 391 U.S. 68 (1968), this Court held unconstitutional the judicial construction given by Louisiana courts to the Louisiana Wrongful Death Act, to the effect that legitimate children, but not illegitimate children, could sue for the wrongful death of their mother. The ground of decision was that such a judicial construction of the statute created arbitrary and discriminatory classes of people who could sue for wrongful deaths, in violation of equal protection guarantees.

For identical reasons, in *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), this Court

held unconstitutional the judicial construction given by Louisiana courts to the Louisiana Wrongful Death Act, to the effect that a mother could not sue for the wrongful death of her illegitimate child. In its decision the Court noted that "A law which creates an open season on illegitimates in the area of automobile accidents . . ." has absolutely no relevancy to any legitimate State interest.

So, too, in the case at bar a scheme of classification that allows suits against federally funded municipal airports but prohibits identical suits against federally funded county airports is totally irrational and unrelated to any legitimate State interest or "public policy."

In a similar vein, the highest courts of several states have recently declared that automobile guest passenger statutes or judicial rules, under which a guest passenger may sue for the host driver's gross negligence, but not for his ordinary negligence, are unconstitutional and void, in that they serve only to create arbitrary and discriminatory classifications of causes of action in contravention of the constitutional guarantees of equal protection and due process. See *Laakonen v. Eighth Judicial District Court*, 538 P.2d 574 (Nev., 1975); *Primes v. Tyler*, 331 N.E.2d 723 (Ohio 1975); *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1975); *Henry v. Bauder*, 518 P.2d 362 (Kan. 1974); *Brown v. Merlo*, 506 P.2d 212 (Cal. 1973).

Likewise, the Pennsylvania Supreme Court recently declared unconstitutional a Pennsylvania statute that provided that all causes of action survived the death of either party, except for causes of action based on libel and slander. *Moyer v. Phillips*, 341 A.2d 441 (Pa. 1975).

Cf., the dissenting opinion of Chief Justice Fatzer in *Brown v. Wichita State University*, 547 P.2d 1015, 1032-1043 (Kan. 1976), *appeal dismissed*, ____ U.S. ____, 97 Sup.Ct. 41 (1976).

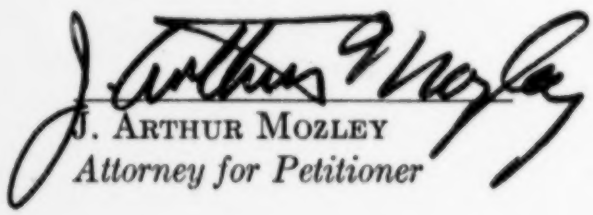
We believe the constitutional infirmity in the classification scheme contended for by DeKalb County is revealed clearly when it is realized that if the City of Decatur (the county seat of DeKalb County), rather than DeKalb County, was the owner and operator of the federally funded airport the issue of sovereign immunity would not be involved in this litigation.

Thus, Code Section 23-1502 cannot within the limits of constitutional guarantees of equal protection and due process be construed to bar the claims involved in this litigation, and the decision of the Court below is erroneous for this reason alone.

CONCLUSION

For all of the reasons stated herein, petitioner respectfully prays that this Honorable Court reverse the decision and judgment of the Court below.

Respectfully submitted,



J. ARTHUR MOZLEY
Attorney for Petitioner

Of Counsel:

PHILLIPS, HART & MOZLEY
1515 Gas Light Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303

(404) 522-2010

CERTIFICATE OF SERVICE

I, J. ARTHUR MOZLEY, attorney for Petitioner Fireman's Fund Insurance Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of March, 1977, I served three true copies of the foregoing Brief of Petitioner on the Merits upon the respondents and all parties, by depositing in a United States mailbox true copies of said petition, with first class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

MR. MEADE BURNS
Long, Weinberg, Ansley & Wheeler
191 Lawrence
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Marietta, Georgia 30060

MR. WENDELL K. WILLARD
Harvey, Rhodes & Willard
125 Trinity Place
Decatur, Georgia 30030

MR. RONALD R. GLANCZ
Appellate Section, Civil Division
United States Department of Justice
Washington, D. C. 20530

MR. WILLIAM D. MALLARD, JR.
Assistant United States Attorney
P. O. Box 912
Atlanta, Georgia 30301

Solicitor General of the United States
Washington, D. C. 20530

Respectfully,

J. ARTHUR MOZLEY
Attorney for Petitioner

EXHIBITS

EXHIBIT A

STATUTES INVOLVED

The "Rules of Decision Act," 28 U.S.C. § 1652, is relevant to the questions presented by this petition. That Act provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The following portions of the Airport and Airway Development Act, 49 U.S.C. §§ 1701, *et seq.*, are also involved:

"§ 1701. Congressional declaration of policy.

"The Congress hereby finds and declares—

"That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

"That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

"That the annual obligational authority during the period July 1, 1970, through June 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958, should be no less than $250,000,000.

"That the obligational authority during the period July 1, 1970, through June 30, 1980, for airport assistance under this chapter should be $2,500,000,000."

* * *

"§ 1711. Definitions.

"As used in this subchapter—

* * *

"(3) 'Airport hazard' means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft."

* * *

"§ 1713. Planning grants.

"(a) In order to promote the effective location and development of airports and the development of an adequate national airport system plan, the Secretary may make grants of funds to planning agencies for airport system planning, and to public agencies for airport master planning."

* * *

"§ 1714. Airport and airway development program.

"(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airport development by grant agreements with sponsors in aggregate amounts not less than the following: . . ."

* * *

"§ 1716. Projection application for airport development.

"(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall

propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches."

* * *

"(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

"(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

* * *

"(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met."

* * *

"§ 1718. Project sponsorship requirements; compliance; contracts between Secretary and public agencies; air traffic control activities; relief of sponsors.

"As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him that—

"(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

"(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

"(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

"(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

* * *

"(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection; . . ."

The following portions of the Georgia Uniform Airports Law, Georgia Code Sections 11-201, *et seq.*, are relevant here:

"11-201. Municipalities, etc., may acquire airports.

"Municipalities, counties, and other political subdivisions are hereby authorized, separately or jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of

aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties or other political subdivisions. . . ."

* * *

"11-205. Authority to equip, improve, establish fees and charges, lease, etc.

"Counties, municipalities, or other political subdivisions which have established or may hereafter establish airports or landing fields, or which acquire, lease, or set apart real property for such purpose or purposes, are hereby authorized:

"(a) To construct, equip, improve, maintain, and operate the same, or to vest authority for the construction, equipment, improvement, maintenance, and operation thereof, in an officer, board, or body of such political subdivisions. The expense of such construction, equipment, improvement, maintenance, and operation shall be a responsibility of said political subdivision.

"(b) Subject to existing contracts, to adopt regulations and establish charges, fees, and tolls for the use of such airports or landing fields, fix penalties for the violation of said regulations, and establish liens to enforce payment of said charges, fees, and tolls.

"(c) To lease such airports or landing fields to private parties for operation or to lease or assign to private parties for operation, space, area, improvements, and equipment on such airports or landing fields: Provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof."

* * *

"11-402. Definitions.

"As used in this Chapter, unless the context otherwise requires:

* * *

"(2) 'Airport hazard' means any overhead power line which interferes with radio communication between a publicly-owned aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off."

"11-403. Airport hazards not in public interest.

"It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking-off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare."

Georgia Code Section 3-108, which authorizes a breach of contract suit by a third party beneficiary, provides:

"3-108. Parties to actions on contracts.

"As a general rule, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

Article XI, Paragraph I of the 1945 Georgia Constitution provides the following with respect to counties:

"Each county shall be a body corporate with such powers and limitations as may be prescribed by law. All suits by or against a county shall be in the name thereof; and the metes and bounds of the several counties shall remain as now prescribed by law, unless changed as hereinafter provided." Ga. Code Ann. 2-7801.

Georgia Code Section 23-1501 provides counties with the following powers:

"23-1501. Every county as body corporate.—

"Every county is a body corporate, with power to sue or be sued in any court."

Georgia Code Section 23-1502, which the courts below construed as supplying counties with carte blanche sovereign immunity in all cases and under all circumstances, provides:

"23-1502. When country liable to suit.—

"A county is not liable to suit for any cause of action unless made so by statute."

With respect to the immunity of municipalities, Georgia Code Section 69-301 provides:

"69-301. Municipal corporations liable for what.

"Municipal corporations shall not be liable for failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable."

Section One of the Fourteenth Amendment of the United States Constitution in pertinent part provides:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

EXHIBIT B

Log of Bird Sightings or Bird Counts Made By
F.A.A. Tower Controllers At The Airport.

26 March 1971

Status report on birds

SC-5h0

On 10 January 1971, a Cessna h01 N9693X reported a bird strike on departure from DeKalb-Peachtree Airport and immediately returned for a landing. This aircraft sustained damage to both wing tip tanks, the leading edge of both wings, and damage to the engine coolings. Prior to this occurrence no records were kept of the bird activity at this airport. From 11 January through 8 February a single entry would be made in our Daily Record of Facility Operations (FAA Form 7230-h) whenever birds were present on the airport and their location presented a potential hazard that required radio notification to arriving and departing aircraft. From 9 February to the present date, a slightly more comprehensive report has been maintained.

From the Daily Record of Facility Operations form:

January	10	-	Large flocks of birds on airport
	11	-	"
	13		"
	15		"
	16		"
	22		"
	26		"
	28		"
	29		"
February	5		"



From supplemental form on bird activity noticed:

February -	9	1000?	About 500 or more birds on top of dump, birds appear to be increasing in numbers but most are landing on the dump level that cannot be seen from the tower cab.
	9	1230	Thousands of black birds on and near the landfill
	9	1400	Thousands of birds on and near the landfill
	9	1530	A couple of thousand birds flying into and out of garbage dump area
	9	1730	Thousands of birds in the landfill area
	10	1103	A Delta Siddeley H125 jet aircraft took off on 22, many thousands of starlings began airborne from garbage dumping area, most of the birds alighted on the grass area adjacent to runway 27, the rest returned to dump.
	10	1205	Groups of hundreds of birds departing dump and crossing airport - apparently after dinner flights.
	10	1400	Thousands of birds around land fill
	10	1435	Several thousands of birds on both sides of landing

Exh #21
WS

February -	10		(cont'd) threshold of runway 27, continued movement
	10	1615	Several thousand birds near the approach of runway 27 and dump area east of runway 20L
	11	1130	Thousands of birds around the landfill
	11	1300	About 900 birds circling the wind sock
	11	1332	Thousands of birds departed the dump area east bound from the dump
	11	1337	Thousands of birds arrived from the east and landed at the dump
		1535	Small flock of birds 2 to 300 flying over dump
		1605	Several thousand birds on approach end of runway 27 and next to runway 20L near dump
	12	1000	Few hundred starlings observed in trees near runway 2R-20L
	12	1102	About a thousand starlings on grass area east of runway 2R-20L and in trees on west southwest part of garbage dump
	12	1230	Thousands of birds around runway 27 and land fill area
	12	1600	Flocks of birds 1000 or more in trees east of runway 20L since 1400 EST
	14	1230	Large flock of birds gathering at dump
	14	1400	Hundred birds seen on grass near wind sock
	14	1510	Large flock of birds around mid-field intersection
	15	1625	Large flock of birds - 1000 or more in dump area and in trees east of runway 20L
	16	0930	A number of birds in trees adjacent to dump
	16	1014	A number of birds in the trees adjacent to dump area
	16	1500	Thousands of birds in the trees along side of runway 20L
	16	1730	Thousands of birds in the trees along side runway 20L they are not flying
	17	1150	About 300 starlings on and near runway 20L
	17	1330	Large flock of birds at dump and at 20L-27 intersection
	17	1420	About 500 birds near the wind sock area and another 500 between runways 2R and 2L south of runway 34
	17	1505	Estimate 2000 birds on dump and flock of birds both sides of runway 20L near wind sock
	17	1753	Several thousand birds observed on the ground in the dump area, something has caused them to take off and fly into the trees on the east side of the dump.
	18	0720	Heavy fog in area
	18	1030	A few hundred birds in trees on west side of dump
	18	1134	Several thousand birds over dump area
	18	1314	Several hundred starlings over runway 2, southeast
	18	1350	Several hundred starlings near runway 20L and over dump
	18	1600	Thousands of birds on ground near runway 20L at wind sock
	18	1640	Thousands of birds over dump and over runway 20L

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February	19	1137	Few hundred birds in trees on west side of garbage dump
	19	1255	Hundreds of birds near wind sock
	19	1325	Flock of birds flew across runway 16 our active runway
	19	1520	1000 starlings over dump area
	19	1630	Thousands of birds on and around runway 20L
	19	1736	Thousands of birds on both sides of the east end of runway 9-27 and on hill on south side of garbage dump
	20	0700	Weather ceiling zero visibility 1/8 fog, no birds observed
	20	1300	Small bunches of birds in the trees along side runway 20L Heavy rain the rest of the day
	21		Rain all day
	22	1005	A few hundred birds in trees adjacent to garbage dump and a few hundred in grass area south of runway 27
	22	1124	A few hundred birds in trees adjacent to garbage dump
	22	1300	A few hundred birds between rockpile and runway 16 and a few hundred near garbage dump
	22	1505	Several hundred birds in trees near garbage dump area
	22	1535	Small flock of birds along runway 16 and large flock several thousand on south side of runway 27
	22	1648	Small flock of birds between runway 20R and 20L south of runway 9-27.
	22	1737	Large flock of birds on approach end of runway 27
	23	0730	Flocks of several hundreds of birds flying in the land fill area
	23	1300	Flock of birds in dump area and a few birds crossing runway 16 at mid field
	23	1515	Flock of birds along runway 20L at dump
	23	1735	Flock of several hundred starlings at end of runway 20L
	24	0730	Few small flocks of birds flying around
	24	1325	About 500 starlings near wind sock
	24	1525	Large flock of starlings in flight over dump
	24	1550	Several thousand birds between runway 20L and dump area
	25		Weather bad
	26		Weather bad rain and fog only a few hundred birds observed throughout day
	27	1300	About 500 birds on runway 2R near land fill and about 300 bi near end of runway 2R
	27	1635	Scattered flocks of starlings all over the airport
	27	1700	About 2000 starlings flying around airport
	27	1730	About 500 birds over runway 16 near the CAS hangar
	27	1750	About 300 birds over mid field
	27	1752	About 500 to 1000 birds on grass east of runway 20L
	28	1525	Thousands of birds on and near runway 27 east end of runway.
March	1	1200	Several hundred birds near wind sock
	1	1500	Many birds in trees near dump
	1	1520	Approximately 2000 birds on end of runway 27 and grass at e
	1	1730	About 200 birds in grass area adjacent to dump

March	2	1220	Several hundred birds in grass on left side of runway 27
	2	1400	Thousands of birds on both sides of runway 9
	2	1645	Several thousand birds both sides of runway 27 east of runway 34
	3	0704	Large flock of birds over dump (Weather very poor throughout the day)
	4	0800	Flock of several birds on the land fill
	4	1055	About 500 starlings flew over runway 34
	4	1145	Several hundred birds east of airport on land fill and runway 27
	4	1529	Hundreds of birds on east side of runway 2R and 20L in dump area
	4	1730	Large flocks of birds on both sides of runway 27 and east of runway 20L 1000 to 2000 birds
	4	1845	About 2000 birds all around dump area
	5	1305	Several thousand birds along runway 20L at dump area
	5	1543	Several thousand birds along runway 20L in dump area and hundreds of birds near windsock
	5	1628	Several thousand birds on the north side of the approach end of runway 27
	6	1100	Several hundreds of birds on and around the dump also in trees adjacent to dump
	6	1200	About 1000 birds at intersection of runway 16 and 27
	6	1500	Approximately 2000 birds south side of runway 27, also about 2000 birds south side of runway 20L, also about 1000 birds in trees near dump
	6	1427	About 2000 birds between runway 2L and 2R
	6	1637	Large flock of birds mid field over dump and wind sock
	6	1745	About 2000 birds between runways runways near runway 34
	7	1110	Several hundred birds over the land fill area
	7	1200	About 1000 birds over dump
	7	1242	About 1000 birds in flight over dump area
	7	1350	About 2000 birds over dump
	7	1524	Several hundred birds on east side of runway 20L-2R
	7	1650	About 2000 birds near taxiway to runway 27 (runway 27 in use)
	8	1115	About 2000 birds over dump area
	8	1335	Large flock of birds in grass area adjacent to 2R-20L a tractor with a dirt scoop is operating in dump area getting dirt from the area near the taxiway to runway 27 and this appears to have scared the birds from the dump area
	8	1503	Thousands of birds in the dump area, because airborne as equipment operating in dump across near the place where the birds are roosting
	8	1610	Thousands of birds on the north side of runway 27 at landing threshold
	8	1750	Several thousand starlings east of runway 2L-20L in trees
	8	1759	A couple of thousand of starlings on approach end of runway 27
	9	1117	A few hundred birds on both sides of 2L-20L
	9	1320	Several thousand starlings on the east side of runway 2R near the dump
	9	1445	Large flock of birds mid field
	9	1520	Several hundred birds left side of runway 20L near wind sock area.

March	10	1210	Approach end of runway 27 covered with starlings
	10	1400	Birds still cover approach end of runway 27
	10	1515	Several thousand starlings at approach end of runway 27
	10	1520	Several thousand starlings left side of the intersection of runway 27 and 20L and between runways 20R and 20L grass area
	10	1600	Several thousand birds near Runway 27 both sides
	11	1335	Several thousand birds on approach end of runway 27
	11	1440	Small flocks of starlings around airport
	11	1610	Small flock of starlings at the dump
	11	1641	Large flock of starlings at the landing threshold runway 20L
	11	1730	Thousands of birds on the land fill on piles of uncovered garbage
	12	1025	About 500 birds near runway 20R southwest of runway 9
	12	1300	About 1000 birds between runway 20R and 20L southwest of runway
	12	1345	Large flocks of birds about 1000 to 2000 on both sides of runway 27
	12	1415	About 2000 birds around wind sock
	12	1440	About 2000 birds still remain around the wind sock and runway 20L and 20R in use
	12	1520	About 2000 birds near landing threshold of runway 27
	12	1730	Thousands of birds on the land fill
	13	1200	About 2000 birds on and around the approach end of runway 27
	13	1600	About 500 birds near runway 27 west end
	13	1700	About 2000 birds around dump area
	14	1530	About 1000 birds over dump area
	14	1615	About 2000 birds near taxiway to runway 2L
	14	1800	About 2000 birds around the dump area
	15	1600	A few thousand birds just eat of 20L and in the garbage dump area
	16	1353	A small flock of starlings, about 1000, east of runway 20L
	16	1521	A few thousand birds just east of 22-20L and in dump area
	16	1738	Large flock of birds about 1000 to 2000) in and around dump east of runway 20L
	17	1200	Several hundred birds observed right side of runway 2R and near wind sock
	17	1600	about 500 birds at dump near runway 2R
	17	1732	About 1000 birds near threshold of runway 27
	17	1730	Many thousands of birds in dump area
	18	1600	Many thousands of birds in and around the dump area
	19	1540	Hundreds of birds near runway 20L at wind sock
	19	1600	Thousands of birds just east of runway 20L and on uncovered material in the garbage dump
	19	1710	A B65 (Eastern-Airlines Jet aircraft) departed on runway 20L, as the aircraft neared the garbage dump many thousands of birds flushed out of the garbage dump, some flew east, some flew west, some south, and some south with others circling around and eventually returning to the dump area after a short flight
	19	1800	Thousands of birds in the garbage dump area
	20	1300	Thousands of birds in dump area
	20	1422	Thousands of birds between dump area and runway 27
	20	1600	Thousands of birds in dump area
	22	1400	Several hundred birds in area east of 2R-20L

March	22	1600	Several hundred birds in trees and dump area east of runway 20L-2R
	23	1114	Large flock of birds in dump area
	23	1535	Flocks of birds on both sides of runway 20L in wind sock area
	23	1650	Thousands of birds in garbage dump area.

We have noted that during periods of inclement weather, rain, fog, high wind, thunderstorms, etc., that the birds do not remain at the airport. Also, it might be added that we have noticed that many, many, many birds are observed to land in the garbage dump area, but because of the terrain they remain out of sight of anyone looking out of the tower. Runway 2R-20L is our long runway and is used by most large aircraft and jets, we have also noted that when one of these pass the dump area the birds come out by the thousands. Then, when the dumping is taking place on the east side of the dump and no pedestrians, trucks, or tractors are operating near the west side of the dump, that most of the birds will stay in the dump area, but let someone come near and again they come out by the thousands.

Pilots are generally rather reluctant to report anything to the government that they can get out of, I guess its because they do not want to become involved in writing long letters and asking out forms. So, we can only report that we have received information from field personnel of four aircraft that have had birds strikes:

N2928C an Aero Commander
N[illegible] a Rockwell-Sidderly Jet
N[illegible] a Lockheed Lodestar
N6268E a Cessna 401

In addition to the possible hazard that these birds present to aircraft operating at the DeKalb-Peachtree Airport, we have the problem of constantly issuing the information to departing and arriving aircraft regarding the size of the flocks, the type of birds and their location on the airport. During our busy periods it is almost impossible to relate off runway, wind, sequence numbers, and clearances for takeoff and landing, this added phraseology, the portion that is strictly for the birds, not only is an added workload to the controller but the amount of talking further complicates the exchange of other necessary communications and in some respects delays traffic.

These bird reports are by no means a report of all bird sightings, it must be understood that the controllers do not always find it time to file the extra reports.

[signature]
[illegible] R. Gibbs
Chief, ATC Tower, DeKalb, Georgia

cc:
AS-670

EXHIBIT C

Written Notice Of Prior Airplane-Bird Strikes At The Airport.

[illegible] OF [ ] VISIT [ ] CONFERENCE OR [X] TELEPHONE CALL | TIME 11:05 a.m. | DATE 25 June 1971

NAME(S) OF PERSON(S) CONTACTED OR IN CONFERENCE AND LOCATION

Call to Mr. James E. Shepherd, Airports Branch

Exh. Deft.
Exh. 9 for Ident.
Depo. of Traeger
Cause No.
HOWARD M. HUDSON

SUBJECT

Bird strike

DIGEST

I advised Mr. Shepherd that N335WR, a Falcon Fanjet landing on Rwy 20L at PDK on 24 June 1971, experienced a bird strike.

Airport Manager also advised of bird strike.

CONCLUSION, ACTION TAKEN, OR RECOMMENDED

Reporting the information.

DATE 25 June 1971 | NAME Chief, ATC Tower, CP Aire, Co. | SIGNATURE John R. Case

FAA Form 1372 (8-63) [illegible] PREVIOUS EDITIONS

RECORD OF [ ] VISIT [ ] CONFERENCE OR [x] TELEPHONE CALL

TIME: 10:30 a.m.

DATE: 26 July 1971

NAME(S) OF PERSON(S) CONTACTED OR IN CONFERENCE AND LOCATION

Mr. James E. Addison
Atlanta Airports Operations Branch

EFTA Deft's Exh. 12 for Ident.
Depo. of Spangler
Cause No.
HOWARD M. HUDSON

ROUTING

SYMBOL	SURNAME

SUBJECT

Bird Strike

DIGEST

I talked with James E. Addison and advised him that on Saturday, 24 July, at 1832 Greenwich Time, N2163W, a PA 28, reported a bird strike while on final for runway 20L.

CONCLUSION, ACTION TAKEN, OR RECOMMENDED

I advised Mr. Addison that birds again seem to be congregating on the airport.

DATE	NAME	SIGNATURE
26 July 1971	Chief, ATC Tower, Ch. Atlanta, Ga.	John R. Cash

FAA Form 1322 (5-62) USE OF PRIOR EDITIONS

3c

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RECORD OF [ ] VISIT [ ] CONFERENCE [ ] TELEPHONE CALL

26 July 1971

NAME(S) OF PERSON(S) CONTACTED OR IN CONFERENCE AND LOCATION

Called by: Mr. John Czar, Chief, ATCT, DeKalb-Peachtree Airport; Atlanta, Georgia

Div. Delta
Ext. 11 Jor Iden.
Depo. of Manget
Cause No.

HOWARD M. HUDSON

ROUTING

SYMBOL	INITIALS
-671.5	
-671	
-670	
670	
674	

SUBJECT

Bird strike; DeKalb-Peachtree Airport; Atlanta, Georgia

DIGEST

Log dossier 674

Mr. Czar called to report a bird strike on 24 July 1971 at 1832 Greenwich Time involving general aviation aircraft N-8463W described as a PA-28. The strike was on final approach to Runway 20L, and Mr. Czar advised that the birds seemed to be flocking again. He also said he was not aware of any aircraft damage.

CONCLUSION, ACTION TAKEN, OR REQUIRED

DATE	TITLE	SIGNATURE
26 July 1971	Supervisory Civil Engineer, SO-671	JAMES E. ADDISON

FAA Form 1322 (2-58) USE PREVIOUS EDITIONS (Form 1322 or 1322-58) 0052-049-9068 (11-68)

Following info received from John Czar, Grand Chief Pk 9-20-71:

Reid Strike.

King Air N211BT Friday, Sept. 17th 1971.

Mooney MU-2 784Q on landing Wed., Sept. 15th 1971.

Plff. Defts.
Exh. 5 for Ident.
Depo. of D. Hancock
Cause No.
HOWARD M. HUDSON

RECORD OF ☐ VISIT ☐ CONFERENCE OR ☒ TELEPHONE CALL

TIME: 5:13 pm

DATE: 9/17/71

NAME(S) OF PERSON(S) CONTACTED OR IN CONFERENCE AND LOCATION

CALLER: John Czar, Tower Chief

CALLED: Robert E. Harris, Chief, SO-674

Phs. Defs.
Ext. 13 for Mon.
Depc. of Manager
Cayce Hq.

HOWARD M. HUDSON

ROUTING

SYMBOL	INITIALS
~~AAO~~ 420	KS/10
673.5	[illegible]

SUBJECT

Bird Strike

DIGEST

King Aire 211BT landing on Runway 2R reported hitting a bird at threshold.

No damage.

F-1/2

Controller:

CONCLUSION, ACTION TAKEN, OR REQUIRED

DATE: 9/20/71

TITLE: Chief, Progress & Inspection Section, SO-674

SIGNATURE: ROBERT E. HARRIS

FAA Form 1322 (2-59) USE PRIOR VERSIONS EDITIONS 0052-995-2000

Pres. Pilot.
Exh. for Ident.
Depo. M. Mengel
Cause No.
HOWARD M. HUDSON

BIRD STRIKE/INCIDENT REPORT

NAME OF OPERATOR: THOMAS G. GERMANY, PILOT
AIRCRAFT TYPE (Make and model): CESSNA 182
OWNER (Name and address): CRAWFORD & Co. $73-4561
AIRCRAFT NATIONALITY AND REGISTRATION MARK: N 719TG
DATE OCCURRED: 11 AUG 1972
TIME (GMT) OCCURRED: 5:31 PM EDST
LOCATION OF INCIDENT: ON AIRPORT — NAME OF AIRPORT: PDK — RUNWAY NO.
☐ in airport traffic area
ALTITUDE: 400-500'
AIRSPEED (Indicated): 85
PART OF AIRCRAFT STRUCK: WINDSCREEN
DAMAGE TO AIRCRAFT: ☐ NO ☐ YES
FLIGHT PHASE AT TIME OF OCCURRENCE (Check one): TAXIING; TAKEOFF; CLIMB; CRUISE; HOLDING; LETDOWN; ✓ APPROACH; LANDING; UNKNOWN
FLIGHT CONDITIONS (Check appropriate combination): ✓ VFR; IFR; VMC; ABOVE CLOUDS; IN CLOUDS; BELOW CLOUDS; BETWEEN CLOUD LAYERS; ICING CONDITIONS
WEATHER CONDITIONS: ✓ CLEAR; PARTLY CLOUDY; OVERCAST; RAIN; SNOW; FOG; WIND 20K; VIZ 5 mile; ✓ DAY; NIGHT; DAWN; DUSK

KIND OF BIRD (Gull, robin, etc.): SMALL & BLACK — PROBABLY STARLING —
SIZE OF BIRD: ✓ SMALL (Sparrow); MEDIUM (Gull); LARGE
NUMBER OF BIRDS: ✓ SINGLE BIRD; FLOCK

SINGLE BIRD/NO FLOCK —

Do you consider the birds reported:
☐ an abnormal no. for this airport
☐ a normal no. for this airport
☐ a hazard to your operation
☐ a nuisance to your operation
☐ no effect to your operation

Compare to other airports:

EXPLAIN ALL "YES" ANSWERS	YES	NO
A. WAS BIRD(S) SEEN PRIOR TO STRIKE		✓
B. WAS EVASIVE ACTION TAKEN		✓
C. HAD THE PILOT BEEN ALERTED TO THE PRESENCE OF BIRDS		

EXPLANATION

OTHER (Explain):
PILOT HIT BIRD APPROX 1 MILE OUT WHILE APPROACHING R/W 20L FOR LANDING —

REPORTED BY: FAA
TALKED TO Pilot 14 Aug 1972.
TITLE: —
DATE: 11 Aug 74

Use reverse side for additional comments

7c

EXHIBIT D

Letters To and From The F.A.A. and DeKalb County Concerning The Bird Hazard And Garbage Dump.

Ex. #30
11-10-75
WB

27 February 1970

Birds

Chief, Operations Branch, SO-540

We would appreciate any assistance that your office can provide in coping with what appears to be an increasing bird problem at this airport. The FAA has operated the airport traffic control tower at the DeKalb-Peachtree Airport since 1 January 1963. From that date until the latter part of 1968, we would have an occasional flock of birds that would light on the airport, remain for a short period of time, then depart. However, since the latter part of 1968 to this date, we have experienced what appears to be a constantly increasing number of birds that are lighting immediately adjacent to runway 2R-20L. Not only are there more in number, but they show no inclination to leave the airport once they arrive.

Runway 2R-20L is our longest runway. We estimate that 95% of the jet and large aircraft using this airport will use runway 2R-20L. For some of the aircraft, this is the only runway that they can use at this airport. Although we have received no official verbal or written complaints from pilots, we have received some of the so-called friendly (?) snide remarks regarding our bird sanctuary. Intermittently we receive requests that ground vehicles be used to shoo away some of these birds. Very recently, the pilot of a Hawker-Siddeley DH-125 jet aircraft stated that he would hold on the ground until the birds were shooed away - after an 18 minute delay - this particular aircraft finally departed.

It may be coincidental, but the garbage dump/land fill that is located immediately adjacent to runway 2R-20L started in 1968. It appears that as the garbage dump/land fill increases in size, so does the size of the flocks.

John R. Czar

JOHN R. CZAR
Chief, ATC Tower, Chamblee, Georgia

9 March 1970

Mr. Paul S. Brayton, Superintendent
Buildings & Grounds Department
DeKalb County
Room 223, DeKalb Building
430 North McDonough Street
Decatur, Georgia 30030

Dear Mr. Brayton:

This agency has reviewed the FAA Form 7460-1 that you submitted on 5 February 1970 for the proposed temporary Sanitary Department Field Office to be located within the north clear zone area for Runway 20L. An aeronautical study conducted in accordance with Part 77, Federal Aviation Regulations, has resulted in a determination that the proposed construction would not exceed any standard of subpart C, Part 77, and would not be a hazard to air navigation from a height viewpoint.

However, there is an increasing bird population in the vicinity of Runway 2R-20L since sanitary fill operations have commenced, which is detrimental to the operational capability of the airport and represents a noncompatible land use of county-owned land. This situation is in direct violation of the assurances that DeKalb County has obligated itself for in obtaining the airport and subsequent improvements. Accordingly, sanitary fill operations near or on the airport should be ceased immediately and no more activity by DeKalb County that might attract birds into that area should be considered.

The land on which you propose to locate the temporary Sanitary Department Field Office is clear zone area on which Federal-aid Airport Program funds have been expended. Therefore, the erection of new buildings or structures other than small, low-service type buildings, such as isolated pump houses or equipment sheds, is specifically prohibited. The proposed temporary field office would have concentration of people at certain times, which is not desirable in clear zones. Also, the concentration of garbage trucks and related

washing or cleaning operations would most likely increase the attraction to birds, which is undesirable, as outlined above. Accordingly, we cannot approve the proposed construction and related sanitary operations on or near the DeKalb-Peachtree Airport.

Sincerely yours,

ORIGINAL SIGNED
David C.

DAVID C. KELLEY
Chief, Atlanta Airports
Operations Branch

cc:
Mr. H. F. Manget w/ltr dtd 2/27/70 from Tower Chief
SO-540 w/ltr dtd 2/27/70 from Tower Chief
Tower Chief

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

15 May 1970

Ex. # 38
11-10-75
WB

Honorable Clark Harrison, Jr., Chairman
DeKalb County Board of Commissioners
556 North McDonough Street
Decatur, Georgia 30030

Dear Mr. Harrison:

We are concerned to learn of continued efforts to develop a sanitary land fill within the boundary of DeKalb-Peachtree airport on land dedicated to airport purposes.

The operation of a sanitary land fill in close proximity to an airport is clearly incompatible with the airport use. Sanitary land fills or garbage dumps attracts flocks of birds to the area. Birds are caught up in aircraft engines and have caused many fatal aircraft accidents.

We know that you would not want this menace to the operation of aircraft to exist near this airport.

We also have a duty to call your attention to some provisions of Grant Agreements between DeKalb County and the United States concerning the operation of DeKalb-Peachtree Airport, as follows:

(From Page 5, Sponsor's Assurances, Project Application, dated 5 April 1968.)

"6. The Sponsor will operate and maintain in a safe and serviceable condition the airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes."

(Page 6, last sentence of paragraph 12.)

"The Sponsor will not make or permit the making of any changes or alterations in the airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility or efficiency of the airport."

"13. Insofar as is within its power and to the extent reasonable, the sponsor will take action to restrict the use of land adjacent to or

in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft."

A few airport sponsors in our area have tried to operate sanitary fills or garbage dumps at their airports. None have successfully done so. Several locations are suffering from the results of garbage dumps on adjacent lands. Several other airport sponsors have considered establishing garbage dumps on their airports but have wisely changed their plans after learning of the disadvantages of this course of action.

We do not consider the establishment of a sanitary fill on this airport to be in keeping with your assurances to use this land only for airport purposes and to operate a safe and serviceable airport. We recognize your problem in disposing of garbage, but we don't consider your airport as being the proper place to do so.

Please advise us of the action you intend to take in regard to this matter. We are enclosing copies of previous correspondence related to this matter.

Sincerely yours,

ORIGINAL SIGNED
David C. Kelley

DAVID C. KELLEY
Chief, Atlanta Airports
Operations Branch

Enclosures

cc:
Mr. H. F. Manget, Jr.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

23 November 1970

Honorable Clark Harrison, Jr., Chairman
DeKalb County Board of Commissioners
556 North McDonough Street
Decatur, Georgia 30030

Ex. # 43
11-10-75
WB

Dear Mr. Harrison:

We have recently received complaints of large flocks of birds near the runways of DeKalb-Peachtree Airport. As you know, birds constitute a real hazard to aircraft operating at the airport. Birds are caught in aircraft engines, especially jet aircraft engines, and have caused many fatal accidents.

We feel certain that you will want to do everything possible to reduce the dangers from this source.

Bird hazards at this airport was the subject of our letter to you dated 15 May 1970. It was also the subject of a conference held in this office on 1 June 1970. Those attending that conference included Mr. H. F. Manget, Manager, DeKalb-Peachtree Airport, Mr. Don Mendonsa, your Administrative assistant, Mr. H. F. Cameron, Superintendent, DeKalb County Department of Sanitation, Mr. Lloyd Mayfield of this office and Mr. Robert E. Harris of this office. Of crucial interest at this conference and in our letter of 15 May 1970 was the operation of a sanitary land fill at the DeKalb Peachtree Airport. The summation of the conference and the letter was that the sanitary land fill, regardless of how efficiently it was operated, was an attraction of flocks of birds. It was our conclusion that the sanitary land fill should be discontinued as soon as possible.

Your representatives at the meeting advised us that funds had been provided in a recent bond election for sanitary improvements in the County. It was their thinking that the sanitary land fill could and would be moved to a different location in the near future.

We would appreciate your advising us as to when this change can be expected. It is our desire to work with you in every way we can to secure safe operation at the DeKalb-Peachtree Airport.

Sincerely,

David C. Kelley

DAVID C. KELLEY
Chief, Atlanta Airports
Operations Branch

cc:
Mr. H. F. Manget, Jr.
Mr. Don Mendonsa
Mr. H. F. Cameron
Mr. John R. Carr

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

16 December 1970

Ex. # 46
11-10-75
WB

Honorable Clark Harrison, Jr., Chairman
DeKalb County Board of Commissioners
556 North McDonough Street
Decatur, Georgia 30030

Dear Mr. Harrison:

We refer to your letter of 30 November 1970 and the letter from Mr. Mendonsa of 9 December 1970.

Subject matter of these letters is the proposed installation of a temporary structure in the north perimeter of the DeKalb-Peachtree Airport for use by the sanitation employees of DeKalb County, the removal of the sanitary land fill from DeKalb-Peachtree Airport and the bird hazard at this airport.

As we understand it, you propose to erect a 40' x 80' Butler type metal building with demountable sections in the north clear zone of runway 20L. This building is to be used for a short duration and will be moved when necessary for airport development or reasons of safety. There is to be no long duration, gathering of a significant number of people. The building is not to violate any safety standards of FAA or any clearances included in FAR Part 77.

In view of past correspondence and conferences held with members of your staff concerning the subject of bird hazards, we are at a loss to understand the remarks in your letter of 30 November 1970 to the effect that your office was unaware that complaints had existed concerning the bird hazards at DeKalb-Peachtree Airport. However, we are gratified to learn that DeKalb County has wisely decided to close out the sanitary land fill at DeKalb-Peachtree Airport.

Based on the above assumptions and assurances we do not object to the construction of the Butler type building for the sanitation workers. Provided; however, it is agreed that this building will be removed when the instrument landing system on runway 2R/20L has been commissioned. We trust that this arrangement will satisfactorily conclude this matter.

We appreciate the steps you are taking to remove the sanitary land fill and thereby decrease the probability of aircraft accidents due to bird strikes. Please advise us if there are any questions concerning these arrangements.

Sincerely,

DAVID C. KELLEY
Chief, Atlanta Airports
Operations Branch

cc:
Mr. H. F. Manget

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Ex. # 49 11-10-75 WB

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

11 January 1971

Honorable Clark Harrison, Jr., Chairman
DeKalb County Board of Commissioners
556 North McDonough Street
Decatur, Georgia 30030

Dear Mr. Harrison:

We have this date received new complaints of bird strikes at DeKalb-Peachtree Airport. We were advised by FAA Tower Chief, Mr. John R. Czar, that approximately 75 birds flew into an aircraft landing at the airport on this past weekend. It appears that the incidence of bird strikes at this airport is increasing.

You advised us in your letter of 30 November 1970 that the sanitary land fill located at the DeKalb-Peachtree Airport would be closed out as soon as planning could be completed for other facilities. Please advise us of the estimated date for closing out the sanitary land fill. For the sake of safety this operation should be terminated as soon as possible. For confirmation of the hazard that exists at this airport due to the sanitary land fill and the accumulation of birds we request that you make inquiries of the FAA Tower Chief, Mr. John R. Czar, and the airport manager, Mr. H. F. Manget, Jr.

We will be happy to meet with you and further advise you of this matter if you so desire. We will appreciate an early response to this request.

Sincerely,

DAVID C. KELLEY
Chief, Atlanta Airports
Operations Branch

cc:
Mr. John R. Czar
Mr. H. F. Manget, Jr.

DeKalb County

DeKalb-Peachtree Airport

ROOM 208 ADMINISTRATION BUILDING

Atlanta, Ga. 30341

Pffs. Defts.
Exh. 3 for Iden.
Depo. of
Cause #
HOWARD M. HUDSON

12 January 1971

Mr. Clark Harrison, Chairman
DeKalb County Board of Commissioners
DeKalb County Courthouse
Decatur, Georgia 30030

Dear Mr. Harrison:

This office has received a report from the Control Tower concerning a near crash of a twin-engine Beechcraft 401 as it took off from DeKalb-Peachtree Airport using Runway 2R. During take-off the aircraft struck a large flock of starlings damaging the plane so that the pilot had to return immediately to the field. About 40 dead birds were found on the runway and an unknown number were removed from the plane's air scoops. This is an occurance which we have been dreading with utmost fear for several years.

Needless to say, this is an extremely dangerous situation and the Federal Aviation Administration is placing a great deal of pressure on the Airport Manager to take positive action to eliminate it. A copy of a letter received this date from Mr. John Czar, Chief Air Traffic Controller, is enclosed. Also enclosed is a copy of the DeKalb County Sanitary Director's letter to Mr. Don Mendonsa. I am not an expert on feathered creatures, but I do know that the garbage dump between Runway 2R/20L and the Buford Highway does attract birds which now number several flocks of 1000 to 2000 birds each. They roost in the trees nearest the dump and in the daylight seem to alternate between the dump and the runway.

Mr. Clark Harrison 12 January 1971

The only solution I can see to this problem at this time is to discontinue use of the garbage dump and to spread at least two feet of dirt on top of the garbage which can be seen at periodic spots throughout the dump.

I can understand Mr. Cameron's feeling, however, the fact remains that the weeds and shrubbery and the Red Rose Feed Plant have not changed materially in the last twenty years, whereas, we have only had the bird problem since the garbage dump was reactivated three or four years ago.

Any suggestions you have on solving this problem will be appreciated.

Yours sincerely,

H. F. Manger, Jr. A.A.E.
Airport Manager

HFMJr:nw
Enclosure(s)

cc:
Mr. Arthur A. Mendonsa
Mr. H. F. Cameron, Jr.
Mr. Howard M. Hinton
Mr. John R. Czar

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

12 January 1971

DeKalb-Peachtree Airport Traffic Control Tower
Room 212, Administration Building
Chamblee, Georgia 30341

Mr. H. F. Manget, Jr.
Airport Manager
DeKalb-Peachtree Airport
Chamblee, Georgia 30341

EX. #50
11-10-75
WS

Dear Mr. Manget:

For your information, we continue to be confronted with the problem of numerous birds on the airport. Most of these birds are located on the east side of the airport, more specifically near Runway 2R-20L.

We have received reports of bird strikes to aircraft that were using Runway 2R-20L. The latest report was from Cessna N9693E, a 401 that is owned by the Bowen Supply Company. After take-off, the pilot reported that he had hit a large flock of birds. The pilot advised that he was returning for a landing. The emergency equipment was alerted.

After landing, it was found that the aircraft had both wing tip tanks dented, the leading edge of the right wing was damaged, and the impact apparently had removed the paint from the bottom portion of the right engine fibreglass cowling. Additionally, a number of birds and parts of birds had been drawn into the engine air intake. The airport security guard was requested to remove the dead birds from the runway. He reported that approximately 35 to 40 birds were removed from the runway. Later, a Hawker-Siddeley jet aircraft, departing on Runway 2R-20L, was delayed until a ground vehicle could scare some of the birds away from the immediate vicinity of the runway.

At 1:55 p. m. on 11 January 1971, the control tower watch supervisor made an entry in the Daily Record of Facility Operation that large flocks of birds, estimated to be several thousand in number, were in the vicinity of Runway 20L.

Although all types of birds have been observed on the airport, doves and starlings seem to be in the majority; but, regardless of the species, your assistance is requested in finding a solution to this problem.

John R Ozar

JOHN R. OZAR
Facility Chief

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHERN REGION
P.O. BOX 20636
ATLANTA, GEORGIA 30320

DATE: 15 January 1971

REPLY REFER TO: SO-674.3

SUBJECT: Alleged Bird Hazard at DeKalb-Peachtree Airport

Ex. #52
11-10-75
SB

TO: FILES

CADO #1 requested a meeting at DeKalb-Peachtree Airport at 1:30 p.m., 13 January 1971.

The purpose of the meeting was to check into the merits of a complaint that a safety hazard was created by birds in and around the airport.

Those in attendance were:

Mr. H. F. Minget, Jr., Airport Manager
Mr. Herb Schorf, CADO #1
Mr. Robert Lewis, SO-43.1
Mr. George Altman, SO-674.3

On Sunday 10 January 1971 at 1:44 p.m., an incident occurred in which an airplane on the runway struck a flock of birds. Minor injuries were sustained by the aircraft with no injuries to personnel.

All present at the meeting went out to the area on the east side between runways 20L and 27 where the garbage dump and land fill operation was observed to be attracting thousands of birds. The majority appeared to be small, probably starlings. Several photographs were made which should substantiate the problem referred to in our letters of 9 March 1970 and 15 May 1970 and a note to the files on 1 June 1970.

The aircraft itself was not available for pictures.

After the others left, I spoke to Mr. Minget for a few minutes about the method of correcting the problem. He confessed that he had been stopped from discussing the matter further with the conservationists. I pointed out that our course of action would be to proceed with a warning that the [illegible] use of land referred to in the above letters constituted [illegible] with Federal agreements. After a reasonable period, all Federal aid could be terminated until the matter is corrected.

Mr. Minget was aware of this and was apparently in agreement that this would be the only effective method of dealing with the situation as he knew that "certain members of the County Commission had remarked that garbage affects everyone in the County, whereas the airport affected only a few".

[signature]
[illegible]
Civil Engineer, SO-674.3

SO-674.3:GCAltman:ab:1/15/71

15d

BEST COPY AVAILABLE

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

3 February 1971

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

Mr. Arthur A. Mondonsa
Executive Assistant to Chairman
Board of Commissioners
556 North McDonough Street
Decatur, Georgia 30030

Ex. #55
11-10-75
WB

Dear Mr. Mondonsa:

We refer to your letter of 25 January 1971 and other recent correspondence and conferences concerning the bird problem at DeKalb-Peachtree Airport. We are aware that discontinuing the present sanitary land fill at the airport and making satisfactory arrangements for a new land fill requires a reasonable period of time. However, we find the failure to be willing to establish a scheduled plan of action to relieve this condition to be inconsistent with the seriousness of this problem of public safety.

Our files reflect several communications with County officials since March 1970 concerning this problem. Our letter of 9 March 1970 to Mr. Paul Brayton stated that the garbage operation was incompatible with the operation of the Airport. A subsequent letter to Mr. Clark Harrison dated 15 May 1970 stressed the same points. You attended a conference in this office on 1 June 1970 together with Airport Manager, Mr. Manget and County Sanitation Supervisor, Mr. H. F. Cameron, in which this problem was discussed. Our lasting impression of this meeting was that the County had, in view of the recent bond election, promised removal of the land fill operations from airport property as soon as practical.

In previous correspondence and conferences we have cited articles of current agreements which the County entered with the United States concerning the operation of this airport. At the cost of being repetitious we will repeat the following excerpts from page 5, Sponsor's Assurances, Project Application dated 5 April 1968:

"6. The Sponsor will operate and maintain in a safe and serviceable condition the airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes."

(Page 6, last sentence of paragraph 12.)

"The Sponsor will not make or permit the making of any changes or alterations in the airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility or efficiency of the airport."

"13. Insofar as is within its power and to the extent reasonable, the sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft."

We request that you reconsider your present decision concerning a target date for the elimination of the sanitary land fill at this airport. If the County fails to respond with a reasonable date and firm commitment to remove this hazard, we will be obligated to study the information available to us and set such date. We think the County is in a better position to establish such date.

Failure of the County to act within a reasonable time to correct this situation will result in a finding of noncompliance on the part of the County with its agreements with the United States. Depending on circumstances prevailing at the time of such noncompliance findings, we may find it necessary to recommend that default actions be taken against the County.

Please let us hear from you as soon as possible concerning the County's present position in these matters. We will be happy to meet with the County Board of Commissioners to discuss this matter if they so desire.

Sincerely,

DAVID C. KELLEY
Chief, Atlanta Airports
Operations Branch

cc:
Honorable Clark Harrison, Jr.
Mr. H. F. Cameron
Mr. H. F. Manget, Jr.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

AIRPORTS DISTRICT OFFICE
1600 Willingham Drive, Suite "C"
College Park, Georgia 30337

28 FEB 1973

Honorable A. C. Guhl, Chairman
DeKalb County Board of Commissioners
556 McDonough Street
Decatur, Georgia 30030

Ex. #74
11-10-75
WB

Dear Mr. Guhl:

In confirmation of your telephone conversation with the Federal Aviation Administration Airports District Office on 27 February 1973, this is to notify the County Commission that the dump on the DeKalb-Peachtree Airport must be closed and covered with dirt immediately. We also insist that any areas on the airport which serve as roosting areas for birds be eliminated. We further strongly recommend that the County investigate the elimination as soon as possible of other roosting areas in the vicinity of the airport.

The hazard that birds attracted to the dump presents to the safe operation of aircraft at the airport is not new. We have corresponded with the County Commission and other county officials about this condition on at least eight previous occasions: 7 March 1970; 15 May 1970; 23 November 1970; 16 December 1970; 11 January 1971; 3 February 1971; 5 November 1971; and 1 February 1972. In addition, we have met on several occasions with County representatives to effect the closing of the dump.

In a letter dated 25 February 1971, Mr. Arthur Mendonsa, Executive Assistant to the Chairman, advised us that the County Commissioners had agreed at a Commission meeting that the dumping of raw garbage at the airport would be terminated as of 1 August 1972. We now have information that the dumping of garbage was not stopped as we believed. If this is true, the continued use of this dump would provide a basis for an FAA determination that the DeKalb County Commission had failed to comply with its agreements with the Federal Government in permitting a hazardous condition to continue and in permitting incompatible land uses. Further, if it is true that dumping was not stopped thus supporting a finding of noncompliance, the DeKalb-Peachtree Airport would no longer be eligible for Federal financial assistance under the terms of the Airport and Airway Development Act. We would also withhold payment of more than $646,000 remaining in projects 9-09-050-D704 and 9-09-050-D705.

Please tell us at once whether our information is correct and the action the County Commission has taken to correct this situation.

Sincerely,

ROBERT E. HARRIS
Acting Chief, Airports
District Office

D. B. MOORE
Chief, General Aviation
District Office No. 1

EXHIBIT E

Series of Court Orders Entered In Suit Filed By F.A.A. Against DeKalb County Fourteen Days After The Crash In Question, Seeking Enforcement Of The Grant Agreements And Alleviation Of The Bird Hazard.

FILED IN CLERK'S OFFICE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
vs.	)	CIVIL ACTION
	)	
	)	
A. C. GUHL, Chairman	)	
WILLIAM A. WILLIAMS	)	
T. M. CALLAWAY, JR.	)	
HOKE CLAYTON SMITH	)	
ROBERT J. MORRIS	)	
W. M. COOLIDGE, JR.	)	
HORIS A. WARD,	)	NO. 17968
Members of the Commission	)	
of Roads and Revenues of	)	
DeKalb County, Georgia	)	

O R D E R

This matter having come on for hearing before the court on March 13, 1973, pursuant to the plaintiff's application for a temporary restraining order, and after hearing the parties and considering the evidence, it is hereby ORDERED as follows:

I.

The defendants are restrained from dumping garbage, refuse, and waste material at the DeKalb landfill adjacent to the DeKalb Peachtree Airport, without covering such matter with at least six (6) inches of dirt at the close of each day's operation. Further, the defendants are directed to place the pulverizer located on the landfill site into operation as soon as possible, but not later than April 15, 1973.

II.

The defendants are also directed to restrict the use of the facilities of the DeKalb-Peachtree Airport to propeller-type aircraft and helicopters, and are enjoined from permitting its use by turbine engine-powered fixedwing aircraft.

III.

The defendants shall permit the personnel of the United States Attorney's office, the Federal Aviation Administration, Environmental Protection Agency, and other appropriate government agencies free access to the airport, landfill and surrounding area to determine compliance with this order and to determine what measures shall be taken to eliminate the bird hazard at the DeKalb-Peachtree Airport.

IV.

Defendants will report to the court on or before 10:00 A.M., May 1, 1973, as to the results achieved in alleviating the bird hazard through compliance with this order.

This order will serve as both a temporary restraining order and a preliminary injunction. On May 1, 1973, or reasonably thereafter, this matter will be set down for such further hearings as are necessary. This order will expire on May 1, 1973, unless extended by further order of this court. In the meantime, however, either party may petition the court for any further relief deemed necessary not covered by this order or for relief from any hardship that may be imposed by this order, if any.

SO ORDERED this 12 day of March, 1973.

ALBERT J. HENDERSON, JR.
United States District Judge

FILED IN CLERK'S OFFICE
MAR 30 1973
BEN H. CARTER, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
	(	
Plaintiff	)	CIVIL ACTION
	(	
vs.	)	NO. 17,968
	(	
A. C. GUHL, ET AL.,	)	
	(	
Defendants	)	

ORDER

This matter having come on for hearing before the Court on March 28, 1973, pursuant to the defendants' Motion for Clarification filed on March 21, 1973, and Motion to Modify or Dissolve filed on March 26, 1973, and after hearing the parties and considering the evidence,

It is hereby ORDERED that defendants' motion of March 26, 1973, to Modify or Dissolve the Temporary Restraining Order and Preliminary Injunction is denied.

It is further ORDERED that Paragraph II of the Court's Order of March 16, 1973, is hereby rescinded and replaced by the following:

II

The defendants are also directed to restrict the use of the facilities of the DeKalb-Peachtree Airport to helicopters, reciprocating engine-powered airplanes, and turbo-prop airplanes equipped with Pratt and Whitney PT6A series engines, and are enjoined from permitting its use by other turbo-prop airplanes and by turbine engine-powered fixed wing aircraft.

So ORDERED, this 30th day of March 1973.

/s/ Albert J. Henderson, Jr.
ALBERT J. HENDERSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
vs.	:	
	:	NO. 17,968
A. C. GUHL, ET AL.,	:	
	:	
Defendants	:	

ORDER

This matter having come on for hearing before the Court on March 30, 1973, on Defendants' Motion for Clarification of the Order of March 16, 1973, and other matters. The Order of March 16, 1973, having been modified by the Court on the 30th day of March 1973, it is further ordered that the Order of this Court of March 16, 1973, be and the same is hereby clarified and modified so as to provide as follows:

All aircraft prohibited from using DeKalb-Peachtree Airport by the aforesaid Order as modified, on the ground at the DeKalb-Peachtree Airport at the time of the entry of said Order, shall be permitted to make one departure flight from said airport and the Plaintiff, its servants, agencies, and employees are hereby restrained and enjoined from imposing any fines, penalties or sanctions against the pilots or owners of the aircraft prohibited from using the DeKalb-Peachtree Airport, who have made only one departure flight since the Order of this Court dated March 16, 1973, insofar as such sanctions are sought to be imposed because of such departure being a violation of the restriction of the airport.

This 5th day of April 1973.

ALBERT J. HENDERSON, JR.
United States District Judge

FILED IN CLERK'S OFFICE

APR 20 1973

BEN H. CALDWELL, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff	:	CIVIL ACTION
vs.	:	NO. 17,960
A. C. GUHL, ET AL.,	:	
Defendants	:	

ORDER

It is hereby ORDERED that Paragraph 2 of the Court's Order of March 16, 1973, as amended by Order of March 30, 1973, and modified by Order of April 5, 1973, is amended to read as follows:

II

The defendants are directed to restrict the use of the facilities of the DeKalb-Peachtree Airport to helicopters, reciprocating engine-powered aircraft, and turbo-prop aircraft and are enjoined from permitting its use by turbine engine-powered fixed wing aircraft. The term turbine engine-powered fixed wing aircraft, as used herein, does not include turbo-prop aircraft.

Said Order of March 16, 1973, as amended and modified, is to remain in effect until further relief or modification is sought by either party to this cause.

Done this 20 day of April 1973.

ALBERT J. HENDERSON, JR.
United States District Judge

6e

FILED IN CLERK'S OFFICE

MAY 18 1973

JAMES H. CARTER, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
:
VERSUS : CIVIL ACTION NO. 17,968
:
A. C. GUHL, et al :

ORDER

On March 12, 1973, the plaintiff, the United States of America, filed a complaint which, in substance, seeks to enjoin the dumping of raw garbage in a landfill adjacent to the DeKalb-Peachtree Airport. The plaintiff alleges that the waste material deposited by DeKalb County attracts large flocks of birds, thereby creating a hazard to the safety of aircraft using the airport. The complaint further stresses the necessity for the continued operation of the DeKalb-Peachtree Airport as an integral element of the Atlanta area air traffic system.

Pursuant to the plaintiff's request for a temporary restraining order, the court conducted a hearing on March 13, 1973 on the merits of the complaint. At the conclusion thereof, counsel for all parties and the court agreed to the temporary imposition of certain restrictions on the use of the airport and the operation of the landfill in order to afford the defendants an opportunity to assess the results of the utilization of a pulverizer which was almost ready for operation at the landfill.

Consequently, an order was entered on March 16, 1973 which, among other things, required the defendants to cover the garbage in the landfill with at least six (6) inches of dirt at the close of each day until such time as the garbage pulverizer was placed in operation. The defendants were further

directed to restrict the use of the airport "to propeller-type aircraft and helicopters" and were enjoined "from permitting its use by turbine engine-powered fixedwing aircraft." On March 30, 1973, the order of March 16, 1973 was amended to clarify the court's intent to prohibit turbo-prop airplanes, except those equipped with Pratt and Whitney PT6A engines, and turbine engine-powered fixedwing aircraft.

By agreement of counsel, these two orders were further modified on April 20, 1973 so as to permit all turbo-prop airplanes to use the airport, thereby prohibiting its use only by turbine engine-powered fixedwing aircraft.

The defendants have now filed a "motion for other relief or an additional hearing", in which they seek to have removed all restrictions placed on air traffic at the DeKalb-Peachtree Airport, including "pure" jet airplanes, on the grounds that (1) the birds are no longer present in such large flocks so as to be hazardous to such planes, and (2) the Federal Aviation Administration, and not DeKalb County, has the responsibility of establishing rules and regulations governing the safe operation of the airport facility.

In support of their first contention, the defendants have submitted written statements of several pilots to the effect that the birds are not now a danger to jet aircraft. These statements are unopposed by the plaintiff and, consequently, are a sufficient basis for removing the present restriction on jet traffic.

As a further reason, the defendants cite the Federal Aviation Act of 1958, which provides in pertinent part under 49 U.S.C. §1348c:

> The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of the aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable air space, including rules as to safe altitudes of flights, and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects. (emphasis added).

By this statute, Congress has placed on the Federal Aviation Administration the responsibility and authority to establish necessary standards for the safety of aircraft in and around commercial airports. Until a final determination can be made by the court of the effect of the current efforts of the defendants in preventing the future congregation of birds at the DeKalb-Peachtree Airport, the normal day-to-day operation of all aircraft at the facility should be resumed under the statutory and regulatory supervision of the Federal Aviation Administration. This is especially true when considering the importance of the airport to commercial aviation in the Atlanta area. The court is of the opinion that this purpose can best be accomplished through the expertise of this agency of the government rather than the cumbersome judicial process.

Accordingly, the restrictions imposed in Paragraph II of the order of this court of March 16, 1973, as amended by the orders of March 30, 1973 and April 20, 1973, are rescinded and revoked. The remaining provisions of said order shall remain in full force and effect until further order of the court.

So ordered this the 18th day of May, 1973.

/s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

FILED IN CLERK'S OFFICE
MAY 21 1973
BEN H. CARTER, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
VERSUS	:	CIVIL ACTION NO. 17958
	:	
A. C. GUHL, et al	:	

O R D E R

Presently pending is the defendants' motion of March 13, 1973, to dismiss for failure to state a claim, to strike portions of the complaint, and for a more definite statement.

The motion to strike and the motion for more definite statement are both directed at identical portions of the complaint and both motions are lacking in merit.

A motion to strike under Rule 12(f) of the Federal Rules of Civil Procedure, is proper to delete those portions of the complaint which are redundant, immaterial, impertinent or scandalous. None of the statements in the complaint fall into these categories.

Rule 12(e) of the Federal Rules of Civil Procedure provides that a motion for a more definite statement is available if the petition "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading". The complaint here is not affected with such a defect. Moreover, two evidentiary hearings have been held wherein the contentions of the plaintiff have been clarified so as to place the issues in proper perspective. Therefore, the motion for a more definite statement is moot and without merit.

One of the grounds on which the defendants move to dismiss is that the contract entered into between DeKalb County

and the United States in 1967 is unclear and could reasonably be misunderstood by the parties, and, as such, is an insufficient basis on which to base a claim for specific performance. The court cannot agree with this contention.

The applicable portions of the contract are neither inequitable nor indefinite. The Project Application, which is incorporated into the contract, provides in pertinent part as follows:

> The Sponsor (DeKalb County) will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes. (Para. 6 - Project Application).
>
> Insofar as is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of the land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft. (Para. 13 - Project Application). (emphasis added).

The operation by the county of a landfill adjacent to the airport in such a manner as to attract birds and thereby pose a hazard to air navigation, is clearly inconsistent with these provisions of the contract.

The defendants also urge that the complaint fails to set forth sufficient facts on which to base injunctive relief. The complaint provides a detailed analysis of the operation of the landfill which allegedly poses a threat to aircraft and human life and is a sufficient basis for a claim for injunctive relief.

In view of the foregoing ruling that the complaint sets out a claim on the contract, it is not necessary, at this time, to consider whether a cause of action is stated under a federal common law nuisance theory.

Accordingly, the defendants' motion of March 13, 1973 is denied.

So ordered this the 21 day of May, 1973.

Judge, United States District Court
for the Northern District of Georgia

FILED IN CLERK'S OFFICE
DEC 17 1973
JAMES E. BARKER, Clerk
By: [illegible] Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 17968
A. C. GUHL, ET AL	:	

CONSENT JUDGMENT

In this suit brought by the United States against the County Commissioners of DeKalb County Georgia, in which plaintiff seeks to enjoin the defendants from operating a garbage dump or landfill adjacent to DeKalb-Peachtree Airport, the Court has been informed that certain actions to increase the safety of air operations at said airport have already been taken by defendants. These include;

1. The county has stopped using said landfill for the dumping of putrescible wastes collected by the county.

2. Most of the landfill area has been covered with a layer of dirt and has been seeded with grass.

3. County personnel police the area for the purpose of guarding against other persons utilizing the landfill for the dumping of putrescible wastes.

4. The county utilizes various sound mechanisms for the purpose of frightening away birds.

5. A county employee patrols the airport runways whenever turbo jet aircraft are to take off, checking the area for birds in order to determine if it is safe for takeoff. If there are no birds in proximity to the runway, the county employee notifies the FAA personnel in the control tower that the airport is open for jet takeoff.

The Court understands that defendants will continue such of these activities as are deemed helpful in reducing the dangers of bird flocks.

By consent of the parties and in order to further increase the level of safety at DeKalb-Peachtree airport, it is hereby

ORDERED, ADJUDGED, and DECREED that:

1. Defendants, their successors and agents, are permanently enjoined from dumping raw or milled garbage or putrescible wastes on or adjacent to DeKalb-Peachtree Airport; this is not intended to apply to waste which is being temporarily held for processing by the pulverizer or to pulverized waste being temporarily held for transportation away from the premises for permanent disposal elsewhere.

2. Defendants, their successors and agents, will take all reasonable precautions to insure that no dumping of raw or milled garbage or putrescible wastes by any other person or entity takes place on or adjacent to DeKalb-Peachtree Airport;

3. The county will operate the pulverizer so as to prevent any accumulation of garbage and to prevent the pulverizer's being an attraction for birds and take whatever other steps are necessary to prevent said pulverizer and its operation from becoming an attraction for birds;

4. Each party will bear his own costs.

Done this 17 day of March, 1976.

ALBERT J. HENDERSON, JR.
United States District Judge

Consented to:

JOHN W. STOKES, JR.
United States Attorney

WILLIAM D. MALLARD, JR.
Assistant United States Attorney

Attorneys for Plaintiff

WENDELL WILLARD

Attorney for Defendants

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-700

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Granted January 17, 1977)

REPLY BRIEF OF PETITIONER FIREMAN'S FUND INSURANCE COMPANY

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April 21, 1977

TABLE OF CONTENTS

Page

INTRODUCTION 1

REBUTTAL OF SOME OF RESPONDENT'S ERRONEOUS FACTUAL ARGUMENTS 2

REBUTTAL OF SOME OF RESPONDENT'S ARGUMENTS OF LAW 7

I. The Pervasive Federal Regulation Of All Aspects Of Aeronautical Commerce Does Preempt Any Conflicting State Law And Policies 7

II. Respondent's References To The Georgia Constitution Are Irrelevant To This Case 11

III. Petitioner Is Not A Mere Incidental Beneficiary Of The Grant Agreement Safety Covenants 11

CONCLUSION 15

CERTIFICATE OF SERVICE 16

EXHIBIT A—Cross-claim of U.S.A. against DeKalb County 1a

TABLE OF AUTHORITIES

Page

Cases:

Arney v. United States, 479 F.2d 653 (9th Cir. 1973) 12, 13

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) 8

Jones v. The Rath Packing Co., 45 U.S.L.Week, 4323 (1977) 9

Kornblut v. Chevron Oil Co., 389 N.Y.S.2d 232 (N.Y.Sup.Ct. 1976) 13, 14

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 8, 10

Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D.Pa. 1967) 13

Starr v. United States, 393 F.Supp. 1359 (N.D.Tex. 1975) 13

Statutes:

49 U.S.C. § 1701 8

49 U.S.C. § 1714 8

49 U.S.C. § 1716 9

49 U.S.C. § 1718 ..... 8, 9

49 U.S.C. § 1718(3) 12

49 U.S.C. § 1718(4) 12

Ga. Code § 23-1502 11

Miscellaneous:

17 Am.Jr.2d Contracts § 302, p. 725 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-700

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Granted January 17, 1977)

REPLY BRIEF OF PETITIONER FIREMAN'S FUND INSURANCE COMPANY

INTRODUCTION

Petitioner Fireman's Fund Insurance Company respectfully submits this reply brief in response to the brief recently filed by respondent DeKalb County.

The first portion of this reply brief will be devoted to correcting some of the erroneous factual statements and arguments contained in the respondent's brief, and the remaining portion of this reply brief will be devoted to a discussion of some of respondent's arguments concerning the applicable law.

In the interest of brevity, petitioner will not attempt to reply to all of respondent's factual and legal arguments and citations of authority. Instead, and in lieu of a more detailed reply brief, petitioner relies upon the facts and legal principles outlined in petitioner's previously filed petition for writ of certiorari and brief on the merits as constituting sufficient rebuttal of the arguments of respondent not specifically addressed herein.

REBUTTAL OF SOME OF RESPONDENT'S ERRONEOUS FACTUAL ARGUMENTS

On page 4 of its brief DeKalb County mistakenly says that by virtue of the lower court orders dismissing the complaint as to DeKalb County, it no longer is in any manner a party to this case.

Although the U.S.A. cross-claimed against DeKalb County for indemnity and/or contribution (J.A. 132),[1] DeKalb County *never* filed a motion to dismiss the U.S.A.'s cross-claim, and the courts below have *never* ruled on the specific issue of whether so-called "sovereign immunity" would bar the U.S.A.'s cross-claims against the County for indemnity and/or contribution. DeKalb County did move to dismiss the *petitioner's complaint*, but such motion by its own terms was limited to the claims asserted by petitioner. (J.A. 176.) In fact, the DeKalb County defendants in their motion to dismiss asked only "that the *complaint* be dismissed as to them." (J.A. 178.)

And the June 27, 1974 formal docket entry of the District Court regarding the order granting DeKalb

[1] As the U.S.A.'s cross-claim was not printed in the Joint Appendix, a copy of the cross-claim is attached as Exhibit A to this Brief.

County's motion to dismiss the complaint specifically provides: "U.S.A.'s cross-claims still pending against DeKalb County defendant." (J.A. 133.)

Throughout its brief DeKalb County has repeatedly described the area immediately adjacent to the jet runway as a "sanitary landfill" rather than as an open raw garbage dump. While petitioner does not wish to be guilty of "splitting hairs," there is a distinction between an "open garbage dump" and a "sanitary landfill" under Georgia law. A "sanitary landfill" is an area in which articles such as construction debris are placed, whereas an "open garbage dump" is exactly what it sounds like—a place where raw, untreated kitchen, toilet and household garbage and waste materials are deposited. Georgia law requires that a compacted layer of at least six inches of clean earth be placed daily over all such raw garbage, and that other steps be taken to reduce the menace posed by open, raw garbage dumps. (J.A. 169.)

It is clear from the record in this case that the airport area immediately adjacent to the jet runway was an open raw garbage dump, and that the County's characterization of such area as a "sanitary landfill" is both incorrect and misleading. (See J.A. 157-158, 169-170.) See also the exhibits appearing on pages 11d, 2e, 7e and 13e of petitioner's March 2, 1977 brief on the merits.

Next, and in connection with its recent efforts to disguise the area immediately adjacent to the jet runway as a harmless "sanitary landfill," DeKalb County in its brief has sought to create the illusion that this case really does not involve the issue of sovereign immunity vis-a-vis interstate aeronautical commerce

and proprietary operation of a federally-funded public airport, but, instead, involves only the question of whether sovereign immunity attaches to the County's "governmental" function of operating a "sanitary landfill." This contention permeates the County's entire line of defense.

For example, on page 17 of its reply brief the County stated (without any citation to the Record):

> "The pleadings before this Court alleged that DeKalb County was negligent not in its operation of DeKalb-Peachtree Airport, but in the County's operation of a sanitary landfill in close proximity to the Airport."

And on page 6 of its Brief the County said (again without Record citation): "Clearly, the central issue in this case is the operation of a *sanitary landfill*, which is obviously a local government function, lacking in any federal consequence except in terms of the environment, not involved here." (Emphasis in original.) The County further said that petitioner has presented an "argument that garbage collection and disposal enters a Federal sphere of influence." (Brief, p. 36.)

This is simply not so, and is clearly an effort to shift attention from the subject of Federal regulation of interstate aeronautical commerce and airports to an irrelevant, non-existent issue.

The gist of petitioner's claim against the County is that the County *operated the airport* in a negligent fashion, and allowed and maintained an *airport hazard*, and failed to take any steps at all to alleviate or guard against the *airport bird hazard*, and willfully violated federal statutes, regulations and contracts imposing specific duties on the County *with respect to airports*,

airport operations, and airport hazards. See paragraphs 53, 54, 56, 58, 61, 63 and 64 of the complaint, and paragraph 58A of the amended complaint. (J.A. 161-165, 167-170 and 182-183.)

The "sovereign immunity" issues in this case relate to and involve the County's proprietary activity of operating a federally-funded airport, and not to the garbage collection duties of the County (whatever such duties may be). The "central issue" is clearly the federally-funded airport, and not a "sanitary landfill."

Moreover, the County's proprietary airport activities are not "lacking in any federal consequence," as federal funds, federal contracts, federally-imposed duties and the safety of interstate aeronautical travellers are directly involved here.

Next, apparently in an effort to imply that the airport operation is not in fact a proprietary function, the County says (Brief, p. 6) that the airport operated at a loss in 1971 and 1972. The record reveals, however, that gross receipts from airport operations in 1971 and 1972 (including commercial leases with rental computed at fixed amounts, plus a percentage of the tenants' revenues) totalled $241,875.00 and $267,959.00, respectively. (J.A. 129-130. See also J.A. 170-172 and 185-186.)

Moreover, the fact that the airport operations may have resulted in a net financial loss during one particular time period does not *ipso facto* convert the operation from a proprietary function to a governmental function.

On page 28 of its Brief the County, without reference to statute, regulation, case law or contract provision, says that petitioner can have no breach of contract

rights greater than those possessed by the F.A.A., and that the F.A.A.'s *sole* remedies for breach of the Grant Agreements and related federal statutes and regulations are withholding or termination of federal funds, and possibly an action for specific performance.

There is absolutely no language in the Grant Agreements and related federal statutes and regulations so limiting the F.A.A.'s rights and remedies.

Moreover, if as contended by petitioner the safety covenants in the Grant Agreements are *intended* directly for the benefit and safety of "aeronautical users," then obviously such "aeronautical users" have available to them whatever remedies are appropriate to enforce their third-party beneficiary rights, regardless of the nature of the remedies that may or may not be available to the F.A.A. itself.

At page 35 and elsewhere in its Brief DeKalb County refers to the total dollar volume or *ad damnum* of all claims resulting from the crash, and argues that its liability insurance and other resources are not sufficient to cover such amounts. The County then tries to tie together its "sovereign immunity" argument by saying that in the event of adverse judgments the "State of Georgia" would be compelled to pay such judgments, and that petitioners' claims therefore are not really claims against the County, but are (directly or indirectly) unconsented-to claims against the "State of Georgia" itself.

Yet the County has referred the Court to no constitutional, statutory or judicial authorities that would make the "State" liable for any judgments entered against the County in this case, and, indeed, the "State" would not be so liable.

Furthermore, petitioner's property damage claim herein is for $549,432.00, and the County admittedly has a $1,000,000.00 property damage liability policy providing *ample* coverage for such claim. (J.A. 72 and 240.) Thus, neither the County nor the "State" would be obliged to pay any judgment in favor of petitioner, as such payment would be made by the County's own liability insurer.

Next, even if it be assumed, *arguendo*, that the "State" would be required to pay a judgment entered against the County, such fact would not in and of itself render the County immune from liability, as the arguments petitioner has previously advanced against application of sovereign immunity in this particular case and factual setting apply to the "State" as well as to the County.

Last, the County's argument concerning its *alleged* inability to pay judgments reflects confusion on the part of the County with respect to the totally separate and distinct concepts of "suability" and "collectibility." The question of whether a judgment in favor of petitioner and against the County would be partially or totally collectible or not has no relevancy at all to the question of whether petitioner has the right to maintain this particular suit against the County herein.

REBUTTAL OF SOME OF RESPONDENT'S ARGUMENTS OF LAW

I. The Pervasive Federal Regulation Of All Aspects Of Aeronautical Commerce Does Preempt Any Conflicting State Law And Policies.

In its brief the County has suggested that there is no "federal preemption" in the area of aeronautical

commerce, and that application of "sovereign immunity" to petitioner's claims therefore is not precluded.

Federal regulation of aeronautical commerce extends to and includes practically every aspect of aviation, and fills several volumes of the United States Code and even more volumes of the Code of Federal Regulations. Specifically included in such federal regulation are federally-funded airports such as the one involved here. See 49 U.S.C. §§ 1701, 1714 and 1718.

As noted by Justice Jackson in his concurring opinion in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944):

> "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.
>
> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, and in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

More recently, in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), this Court had occasion

to reaffirm that the pervasive federal regulation of all aspects of aviation and aeronautical commerce of necessity preempts and precludes enforcement of any state and local laws and policies that might thwart the policy and objectives of the federal regulation, *regardless of whether the scheme of federal regulation contains any express provision for such preemption.* See 411 U.S. 625 and 633.

And only last month, in a different context, this Court in *Jones v. The Rath Packing Co.*, 45 U.S.L. Week 4323, 4325 (1977) confirmed that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." The Court also noted that in determining questions of preemption it was necessary "to consider the relationship between state and federal laws *as they are interpreted and applied*, not merely as they are written." 45 U.S.L. Week 4325. (Emphasis added.)

In the case at bar, the commands of 49 U.S.C. §§ 1716 and 1718 and the Grant Agreement safety covenants are quite explicit—DeKalb County was required to remove, mitigate and prevent "airport hazards," and to operate the airport in a "safe condition" for "aeronautical users," and to prevent "*any* activity thereon which would interfere with its use for airport purposes." The County violated these federally-imposed statutory and contractual duties, and such violation directly and proximately resulted in the type of injuries and damage the federal regulation was designed to prevent.

Any state law and policy—or any interpretation or application of state law and policy—that would prohibit th. County from being held accountable for

breach of its federally-imposed duties can serve only to thwart, hinder and emasculate the expressly-stated safety objectives of federal regulation of aviation and airports. Accordingly, such state law (here present in the form of a local concept of county immunity) cannot be given force and effect.

In this regard, the words of Justice Jackson in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) are not inappropriate:

> "Any authorization of local burdens on our national air commerce will lead to their multiplication in this country."

It is difficult to imagine how the safety objectives of federal regulation of federally-funded airports could be more burdened and thwarted than by subjecting the "rights to sue" of interstate aeronautical travellers at such airports to the vagaries of differing laws of various localities relating to the "immunity" *vel non* of a host of various local entities such as counties, cities, agencies, boards, authorities, etc.

DeKalb County's argument that subjugation of the safety objectives of the federal statutory and contractual covenants at issue here to the vagaries of local "immunity" laws would not hinder or burden the federal policy of airport safety just does not comport with reality. Within the particular factual setting of this case, the preemptive effect of federal airport regulation does—and clearly *should*—preclude enforcement of the local "immunity" law relied upon by the County.

II. Respondent's References To The Georgia Constitution Are Irrelevant To This Case.

In addition to relying upon Georgia Code Section 23-1502 relating to county immunity, respondent has urged that its alleged immunity from suit has a basis in the Georgia Constitution. See pages 9-10 of respondent's brief. In this respect, respondent says that the statutory immunity embodied in Georgia Code Section 23-1502 has been "constitutionalized" by the Georgia General Assembly and the electorate.

The airplane crash in question occurred on February 26, 1973. The constitutional amendment relied upon by DeKalb County was not proposed and approved by the General Assembly until late in 1973, and was not ratified by the electorate and did not become effective until November, 1974.

Petitioner's rights had become vested long before the constitutional amendment relied upon by respondent was proposed, approved and ratified, and the amendment clearly cannot be given retroactive or ex post facto effect. Such amendment therefore has no relevancy at all to the issues involved in this case.

III. Petitioner Is Not A Mere Incidental Beneficiary Of The Grant Agreement Safety Covenants.

Petitioner has no quarrel with respondent's arguments that under both Georgia and Federal law only *intended* third party beneficiaries—as opposed to *incidental* third party beneficiaries—can sue for breach of the Grant Agreement safety covenants here involved. Petitioner disagrees vigorously, however, with respondent's conclusory allegations that the petitioners in

these four cases before the Court are not *intended* beneficiaries.

As discussed in our earlier petition and brief, the safety covenants specifically imposed on the County both by 49 U.S.C. § 1718(3) and (4) and by the Grant Agreements are *ex facie* directly intended for the safety and benefit of airport users, aeronautical travellers, and persons on the ground who may be affected by unsafe airport conditions. Indeed, the very essence of practically all federal regulation of aeronautical commerce is aviation safety.

Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973), involving a different yet not wholly irrelevant aspect of federal regulation of aviation, is apropos here:

> "The Civil Aeronautics Act, the predecessor to the Federal Aviation Act of 1958, was enacted, and regulations promulgated thereunder, to promote civil aviation while assuring maximum safety in the air. Rosenhan v. United States (10 Cir. 1942), 131 F.2d 932, 934, cert. denied, 318 U.S. 790, 63 S.Ct. 993, 87 L.Ed. 1156. The 1958 Act had the same purposes. 1958 U.S. Code Cong. & Adm. News, p. 3741. The purpose of the certification of aircraft under the 1958 Act and regulations was to reduce accidents, and the government may be liable for negligence in improper issuance of a type airworthiness certificate. Rapp v. Eastern Air Lines, Inc. (E.D.Pa. 1967), 264 F.Supp. 673, 676, 680, aff'd sub nom., Scott v. Eastern Air Lines, Inc. (3 Cir. 1968), 399 F.2d 14, cert. denied 393 U.S. 979, 89 S.Ct. 446, 21 L.Ed.2d 439. . . .
>
> "The safety of pilots and others aboard aircraft, as well as persons on the ground, depends upon the airworthiness certification program under the Act. We hold that the appellants, Arney and Baker,

> were within the class intended to be protected by regulations and that the alleged harm suffered was of the kind which the regulations were intended, in general, to prevent. The accident which occurred was exactly the sort of risk that might reasonably be anticipated to flow from violation of the Act and the regulations promulgated thereunder." (Footnotes omitted.)

No rational argument can possibly be advanced that petitioners in the cases at bar are not *direct and intended* beneficiaries of the statutory and contractual covenants at issue. The only *conceivable* beneficiaries of such covenants are persons who occupy the same status or class as petitioners.

The courts have consistently held that persons occupying the same status as petitioners here are the direct and intended beneficiaries of the safety duties imposed by law on the F.A.A. under the various Federal aviation statutes. See, *e.g.*, *Arney v. United States*, 479 F.2d 653, 658 (9th Cir. 1973); *Starr v. United States*, 393 F.Supp. 1359, 1364 (N.D.Tex. 1975); *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D.Pa. 1967).

Thus, as petitioners clearly are the direct and intended beneficiaries of the safety duties imposed on the F.A.A. by federal law, plain logic compels the conclusion that petitioners are likewise the direct and intended beneficiaries of the similar safety covenants imposed on the County by federal law. Accordingly, petitioners are entitled to maintain their breach of contract claim against the County.

In addition to the cases cited above and in our earlier petition and brief with respect to the third-party beneficiary issue, petitioner wishes to bring to the attention of the Court the recent decision in *Kornblut v. Chevron*

Oil Co., 389 N.Y.S.2d 232 (N.Y.Sup.Ct. 1976), in which the Court ruled that members of the traveling public were third-party beneficiaries of certain safety and other covenants in a contract between a governmental entity and a private party, and that plaintiff, as a third-party beneficiary, could bring her wrongful death action on a breach of contract theory. The *Kornblut* court based its decision in part on the principle enunciated in 17 Am.Jur.2d Contracts § 302, p. 725:

> "The courts generally have been more liberal in applying the third-party beneficiary rule to public contracts than to private contracts." 389 N.Y.S.2d 234.

In closing, petitioner wishes to make the following general observations in response to the other arguments and case citations set forth in DeKalb County's brief:

(1) None of the "immunity" cases relied upon by respondent involved proprietary operation of an airport by a county, or federal grant agreements, or a factual situation and framework of federal regulation even remotely similar to those involved here.

(2) Respondent has not cited a single case (Georgia or otherwise) holding that operation of an airport by a county is a governmental function.

(3) Respondent has totally ignored the Georgia decisions holding that operation of an airport by a governmental entity is a proprietary function, one of which decisions flatly holds that respondent's operation of the airport involved here is a proprietary, non-governmental function.

(4) No Georgia court has ever held that a county is entitled to immunity from damage claims arising from the county's ownership and operation of a federally-funded airport.

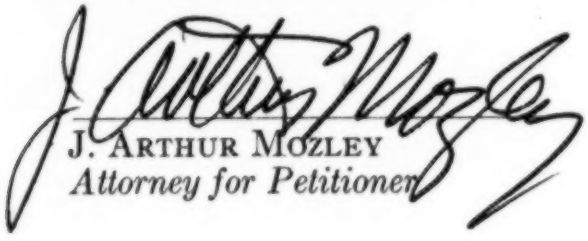
CONCLUSION

If respondent really has total and complete immunity from any and all claims resulting from its proprietary ownership and operation of the airport, why has the respondent each year purchased a large insurance policy providing liability coverage to respondent with respect to airport operations?

The answer is simple. The County has no such immunity from liability, and like any wise businessman, the County secured insurance to protect against its liability.

The decision below should be reversed and petitioner should be allowed a trial of the claims based on negligence, nuisance and breach of federal statutory and contractual safety covenants.

Respectfully submitted,



J. ARTHUR MOZLEY
Attorney for Petitioner

Of Counsel:

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CERTIFICATE OF SERVICE

I, J. Arthur Mozley, attorney for Petitioner Fireman's Fund Insurance Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of April, 1977, I served three true copies of the foregoing Reply Brief of Petitioner Fireman's Fund Insurance Company upon the respondents and all parties, by depositing in a United States mailbox true copies of said Brief, with first class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

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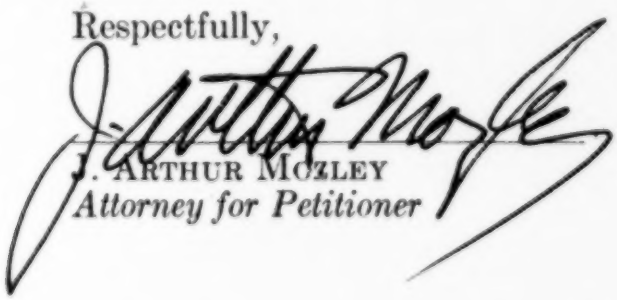
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Respectfully,



J. ARTHUR MOZLEY
Attorney for Petitioner

EXHIBIT A

EXHIBIT A

Cross-Claim of U.S.A. Against DeKalb County

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,
DEKALB COUNTY, GEORGIA
A. C. GUHL
WILLIAM A. WILLIAMS
T. M. CALLAWAY, JR.
HOKE CLAYTON SMITH
ROBERT J. MORRIS
W. M. COOLIDGE
HORIS A. WARD
H. F. MANGET,

Defendants.

CIVIL NO. 7424A

ANSWER, CROSS-CLAIMS, AND COUNTERCLAIM

Now comes defendant, United States of America, by and through its attorneys, and in answer to plaintiff's complaint states and avers as follows:

Response to Count One

1. The United States admits the allegations of paragraphs 6, 26, 27, 45, and 50 of Count One of plaintiff's complaint.

2. The United States denies the allegations of paragraphs 7, 8, 9, 12, 17, 18, 19, 42, 47, 49, 52, 55, 56, 57, 59, 60, and 64 of Count One of plaintiff's complaint.

3. The United States denies the allegations of paragraphs 1, 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 2(h), 2(i), 2(j), 3(b), 13, 14, 38, 39, and 40 of Count One of plaintiff's complaint for lack of information sufficient to form a belief as to their truth.

4. The allegations of paragraphs 2(a) and 44 of Count One of plaintiff's complaint are conclusions of law which require no answer and are referred to the Court for determination.

5. Responding to the allegations of paragraphs 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 35, 43, 51, 53, and 61 of Count One of plaintiff's complaint; the United States avers that the statutes (paragraphs 20, 21, 22, 23, and 24), Federal Air Regulations (paragraphs 28 and 29), Advisory Circular (paragraphs 30, 31, and 32), Terminal ATC Manual (paragraph 33), court decision (paragraph 35), Grant Agreements (paragraphs 43, 51, and 53) and the Georgia Code and 1960 DeKalb County Airport Zoning Resolution (paragraph 61) recited therein speak for themselves and that no answer is required.

6. The allegations of paragraphs 54, 58, 62, 63, and 66 of Count One of plaintiff's complaint are directed to DeKalb County; no response is required by this defendant.

7. Responding further to the allegations of paragraphs 61(h) and 63 of Count One of plaintiff's complaint the United States specifically denies the existence of any "bird hazard" or "airport hazard."

8. Responding to the allegations of paragraph 3(a) of Count One of plaintiff's complaint the United States admits it received an administrative claim on May 30, 1973 on behalf of Southeast Machinery, Inc. and Fireman's Fund Insurance Company and that the Federal Aviation Administration denied said claim on January 22, 1974. All other allegations of paragraph 3(a) are conclusions of law which require no answer and are referred to the Court for determination.

9. Paragraph 4 of Count One of plaintiff's complaint is an instruction which requires no answer.

10. Responding to paragraph 5 of Count One of the complaint, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that Southeast Machinery, Inc. owned the described aircraft. Responding further, this defendant admits on February 26, 1973, at approximately 10:12 a.m. E.S.T., a Learjet Model 24 aircraft, N-454RN, was in the process of taking off from Runway 20L at DeKalb-Peachtree Airport. Responding further, this defendant denies the remainder of the allegations contained in paragraph 5 of Count One of the complaint.

11. The United States admits the allegations of paragraph 10, 15, and 16 of Count One of plaintiff's complaint to the best of our knowledge at this time.

12. Responding to Paragraph 11 of Count One of the Complaint, this defendant admits some dead starlings or other birds were found at or near the departure end of Runway 20L. The United States denies all other allegations of this paragraph.

13. Responding to paragraph 25 of Count One the United States admits it administers air traffic control

of civil air operations within United States airspace; operates F.A.A. air route traffic control centers, airport traffic control towers, flight service stations, and related communication equipment required for control of air traffic; and collects and disseminates information relative to civil aeronautics and safety of flight pursuant to authority from Congress.

14. Responding to the allegations of paragraph 36 of Count One of plaintiff's complaint, the United States admits the first two sentences of this paragraph; the United States denies for lack of information sufficient to form a belief as to its truth the reason the County operates the airport.

15. Responding to the allegations of paragraph 37 of Count One of plaintiff's complaint, the United States admits that F.A.A. air traffic control personnel operated the air traffic control tower at DeKalb-Peachtree Airport on February 26, 1973. All other allegations of paragraph 37 are denied for lack of information sufficient to form a belief as to their truth.

16. Responding to the allegations of paragraph 41 of Count One of plaintiff's complaint the United States denies the first two sentences of this paragraph for lack of information sufficient to form a belief as to their truth. The last two sentences of this paragraph are denied.

17. Responding to the allegations of paragraph 46 of Count One of plaintiff's complaint the United States admits there is an airport layout plan which illustrates "airport facilities," these facilities would not include a garbage dump.

18. Responding to the allegations of paragraph 48 of the cause of action section of plaintiff's complaint,

the United States admits that F.A.A. personnel communicated with DeKalb County regarding birds and the sanitary landfill from March 9, 1970, through February 14, 1972 and that to our knowledge at this time no communication occurred from February 14, 1972 to February 26, 1973. All other allegations of paragraph 48 are denied including the existence of any "bird hazard."

19. Responding to the allegations of paragraph 65 of Count One of plaintiff's complaint, the United States denies the allegations of paragraphs 65(a) and 65(b) for lack of information sufficient to form a belief as to the truth. The allegations of paragraph 65(c) are directed to DeKalb County defendants; no answer is required by this defendant.

20. Responding to the allegations of paragraph 34 of Count One of plaintiff's complaint the United States admits it has had knowledge of bird strike incidents since 1940. Each and every remaining allegation of paragraph 34 is denied. The United States specifically denies the existence of any "bird hazard" at the DeKalb-Peachtree airport. The United States affirmatively avers that 1946 statistics on bird strike incidents are wholly irrelevant to the accident which is the subject matter of this suit.

Response to Counts Two and Three

1. Responding to the allegations of paragraph 1 of Counts Two and Three of plaintiff's complaint, the United States hereby adopts and incorporates by reference its answers to paragraphs 1 through 66 of Count One of plaintiff's complaint as is fully set out herein.

2. The allegations of paragraphs 2 and 3 of Counts Two and Three of plaintiff's complaint are directed to the DeKalb County defendants; no response is required of this defendant.

AFFIRMATIVE DEFENSES

1. Plaintiff's complaint fails to state a cause of action upon which relief can be granted against the United States.

2. Any liability that may exist for plaintiff's death lies in a third party, not the present defendant, United States of America.

3. That the provisions of 28 U.S.C. § 2680(a) are applicable to this defendant.

4. That the provisions of 28 U.S.C. § 2680(h) are applicable to this defendant.

5. The flight of the aircraft was made in connection with, subject to and with acceptance of the known risks and perils of the air through which said aircraft travelled, and acts of God, over which this defendant had no control; and by undertaking said flight, the plaintiff assumed, accepted and undertook all said risks and dangers, of which they had actual or constructive knowledge; and said accident arose out of and resulted from said risks, dangers and acts of God.

6. Defendant, United States of America, denies that any negligent or wrongful act or omission on the part of any agent or representative of the United States caused and/or contributed to the happening of the accident.

7. Employees of plaintiff's insured, Machinery Buyer's Corp. and Southeast Machinery, Inc., were

engaged in a joint venture with others in the use of the aircraft, and any negligence by plaintiff's insured employees contributing to the claimed damages is imputed to plaintiff.

8. That the negligence of the crew of the aircraft caused or contributed to the accident and the damages sued for herein.

CROSS-CLAIMS

Now comes defendant, United States of America, by and through its attorneys and for its cross-claims against co-defendants DeKalb County, Georgia, A. C. Guhl, William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, W. M. Coolidge, Horis A. Ward and H. F. Manget states and avers as follows:

1. Cross claimant hereby adopts by reference all the allegations contained in the complaint filed in this case, without prejudice to the cross claimant's answers and allegations heretofore entered.

2. If the facts alleged in the complaint as to them are true, co-defendants DeKalb County, Georgia, A. C. Guhl, William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, W. M. Coolidge, Horis A. Ward and H. F. Manget are the responsible parties for any damages that plaintiff may have suffered as a result of the accident alleged in the complaint.

3. Cross-defendants DeKalb County, Georgia, A. C. Guhl, William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, W. M. Coolidge, Horis A. Ward and H. F. Manget are liable to the cross-

claimant herein for all or part of any amounts that the cross-claimant may be adjudged liable to plaintiffs.

COUNTERCLAIM

Now comes defendant, United States of America, by and through its attorneys and for its counterclaim against plaintiff, states and avers as follows:

1. Counterclaimant hereby adopts by reference paragraphs 7 and 8 of the affirmative defenses herein.

2. That the crash occurred due to the negligence and carelessness of the plane's crew in operating, flying, piloting and controlling said aircraft and in planning said flight.

3. Plaintiff is, therefore, liable to the counterclaimant herein for all or part of any amounts that the counterclaimant may be adjudged liable for arising out of the occurrence that is the subject matter of plaintiff's claim.

Wherefore, defendant, United States of America, demands judgment dismissing the complaint herein, together with its costs and disbursements, and for such other further and different relief which the Court may deem just and proper.

JOHN W. STOKES, JR.
United States Attorney

WILLIAM D. MALLARD, JR.
Assistant U. S. Attorney

/s/GEORGE M. FLEMING

GEORGE M. FLEMING
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer, Cross-Claims, and Counterclaim was mailed this 1st day of April, 1974, to:

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Atlanta, Georgia 30303

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Long, Weinberg, Ansley & Wheeler
Equitable Building
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Decatur, Georgia 30030

/s/ George M. Fleming
George M. Fleming